TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. ~~1900~~ 1902.

No ~~589~~ 2044. 62.

THE MOBILE TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MARCH 20, 1901.

(18,084.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 599.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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a MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
CITY OF MOBILE, Defendant in Error.

I, Robert F. Ligon, Jr., clerk of the supreme court of the State of Alabama, by virtue of the writ of error and in obedience thereto, do hereby transmit to the Supreme Court of the United States an authenticated copy of the record of the proceedings had in the supreme court of the State of Alabama in the case of The Mobile Transportation Company, a corporation, appellant, *vs.* The City of Mobile, a municipal corporation, appellee, attaching thereto a copy of the opinion filed by the supreme court of the State of Alabama in said cause, and together with the assignments of errors and prayer for the reversal of the decision of the supreme court of the State of Alabama, together with the citations to Gregory L. & Harry T. Smith, attorneys for The City of Mobile, the defendant in error, with the returns of the marshal thereon; also the original writ issued by the supreme court of the State of Alabama and the prayer of The Mobile Transportation Company, plaintiff in error, therefor, and the order of the chief justice of the supreme court of the State of Alabama allowing the same, his certificate, and the bond filed by the plaintiff in error, approved by the chief justice of the supreme court of the State of Alabama.

In testimony whereof I have caused the seal of this the supreme court of the State of Alabama to be hereunto affixed, in the city of Montgomery, State of Alabama, on the twenty-fifth (25th) day of February, one thousand nine hundred and one—1901.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of the State of Alabama.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Alabama, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Mobile Transportation Company, defendant and plaintiff in error, and The City of Mobile, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, and wherein was drawn in question the construction of a treaty and statute of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such

clause of the said treaty and statute, a manifest error hath happened, to the great damage of the said Mobile Transportation Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the twenty-third (23) day of March, A. D. 1901, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of
c the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-third (23d) day of February, A. D. 1901.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES,
Clerk of the Circuit Court of the United States of America, Southern District of Alabama.

Allowed by—
T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

MOBILE, ALABAMA.

Received in office February 23d, 1901.
FRANK SIMMONS,
U. S. Marshal.

Executed by serving a copy of the above writ on Harry T. Smith, one of the firm of Gregory L. & H. T. Smith, this February 23d, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

Marshal fee, $2.00.

d UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Mobile, a municipal corporation in Alabama, Gregory L. Smith and Harry T. Smith, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office *at* the supreme court of Alabama, at Montgomery, wherein The Mobile Transportation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned

should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand, at the city of Montgomery, in the State of Alabama, this the 22nd day of February, in the year of our Lord one thousand nine hundred and one.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

MOBILE, ALABAMA.

Received in office February 23d, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

Executed by serving a copy of the above writ on Harry T. Smith, one of the firm of Gregory L. & H. T. Smith, this February 23rd, 1901.

FRANK SIMMONS,
U. S. Marshal, Sou. District of Alabama.

e To the Honorable Thomas N. McClellan, chief justice of the supreme court of Alabama:

Your petitioner, The Mobile Transportation Company, respectfully prays your honor for a writ of error to the Supreme Court of the United States from the judgment of this court rendered in this cause on the docket of this court as No. 953, first division, and entered Mobile Transportation Company, appellant, *vs.* City of Mobile, appellee, on the 20th day of December, A. D. 1900, affirming the judgment of the circuit court of Mobile county, Alabama, for the reasons fully set forth in the certificate annexed to this petition as part thereof and which your petitioner prays your honor to sign, and that your petitioner may have such other or further relief as it may be entitled to, the premises considered.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Attorneys for Plaintiff in Error.

f THE CITY OF MOBILE, a Municipal Corporation, etc., Plaintiff,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama, Defendant.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of this cause:

The supreme court of Alabama erred—

1. In rendering the judgment of December 20, 1900, affirming the judgment of the circuit court of Mobile county for the plaintiff in the above-entitled cause.

Trans., p. 91.

2. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint upon the ground that the lands sued for were under the ebb and flow of the tide.

Trans., p. 10.

3. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint upon the ground that the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

Trans., p. 10.

4. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint, because the suit is for soil under the navigable waters of this State.

Trans., p. 10.

5. In affirming the action of said circuit court in overruling the defendant's demurrer to the complaint, because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

Trans., p. 10.

6. In affirming the action of the said circuit court in overruling the defendant's objection to the admission in evidence of the act of the General Assembly of Alabama approved January 31, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front," as found in the Pamph. Acts of Alabama of 1866–'67, page 307, and in admitting the same in evidence.

Trans., pp. 21 and 22.

7. In affirming the action of said circuit court in overruling defendant's objection to the admission of said act of January 31, 1867, upon the ground that "the act is void as being *ultra vires*, because the State is a trustee for the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts."

Trans., p. 21.

8. In affirming the action of said circuit court in overruling defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river, and extends to the water line at low water.

Because accretions belong to the riparian owner."

Trans., p. 21.

9. In affirming the action of said circuit court in overruling the objection of defendant to the introduction in evidence of said act of January 31, 1867, "because the plaintiff is no longer in existence, because its existence was terminated by the act approved February 6, 1897, page 542 of the Pamph. Acts of Alabama of 1896–'97."

Trans., p. 21.

10. In affirming the action of said circuit court in overruling the objection of defendant to the introduction of said act of January 31, 1867, "because the act shows on its face that plaintiff is barred by the statute of limitation of twenty years."

Trans., p. 21.

11. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act does not give the city of Mobile any right of possession."

Trans., p. 22.

12. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to said city of Mobile only the shore and soil under Mobile river, within the boundary lines of the city of Mobile."

Trans., p. 22.

13. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act."

Trans., p. 22.

14. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of said act of January 31, 1867, "because said act does not show that the State had any right of possession to the shore and soil under Mobile river, described in said act, at the time of the passage of said act."

Trans., p. 22.

15. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of the act to incorporate the city of Mobile, found in the Acts of Alabama of 1866, page 202, being the act referred to in the act just preceding offered, giving the limits of the city, and in admitting the same in evidence.

Trans., p. 22.

16. In affirming the action of the said circuit court in overruling the defendant's objection to the introduction in evidence of the act approved February 18, 1895, to be found in the acts of the General Assembly of Alabama of 1894–95, page 115, entitled "An act to fix the right of the city of Mobile to certain real estate," and in admitting the same in evidence.

Trans., p. 22.

17. In affirming the action of said circuit court in overruling the defendant's objection to the introduction in evidence of the act

found in the Acts of the General Assembly of Alabama of 1896–'97, page 50, entitled "An act to fix the rights of the city of Mobile in certain real estate, approved February 18, 1895."

Trans., p. 23.

18. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence "so much of volume 3 of the American State papers in relation to the public lands as forms part of the registry of claims to lands in the district east of Pearl river, in Louisiana, founded on private conveyances, etc., as relates to the claim of Regis Bernoudy, numbered 11, on page 30 of said printed volume."

Trans., p. 24.

19. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence "so much of said volume 3 of the American State papers in relation to the public lands as appears on pages 400, 401, and 402 of said volume, as report number 9, 'Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, etc.'"

Trans., p. 24.

20. In affirming the action of the said circuit court in sustaining the plaintiff's objection to and in excluding from evidence both of said reports referred to above when offered to show color of title.

Trans., p. 24.

21. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the treaty of 1819 between the United States and Spain as printed in the United States Statutes at Large in the volume entitled "Revised Statutes of the United States Relating to the District of Columbia, Post-roads, and Public Treaties," Forty-third Congress, 1873–'75, at pages 712 to 718.

Trans., p. 25.

22. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence article VIII of said treaty, on page 714 of said volume, specially offered by the defendant.

Trans., p. 25.

23. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignees of Regis Bernoudy, for section thirty-eight, in township four south, range one west, containing five hundred and seven acres and seventy-six hundredths acres, in the district of land subject to sale at St. Stephens, Alabama, dated the 28th of December, 1836.

Trans., p. 25.

24. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the field-

notes entitled "Com'r rt. No. 10, claim No. 11, sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district of Alabama."

Trans., pp. 26, 27.

25. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the copy of the tax-lists of the city of Mobile from 1867 down to and including 1878, being Exhibit "B" to the bill of exceptions.

Trans., p. 49.

26. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the tax-lists of the port of Mobile and city of Mobile from 1879 down to and including 1897, Exhibit "C" to the bill of exceptions.

Trans., p. 50.

27. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the receipts and tax bills of the city of Mobile for the years 1894, '95, '96, and '97, Exhibits "D," "E," "F," and "G" to the bill of exceptions.

Trans., p. 50.

28. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence any testimony whatever in regard to the payment of taxes to the city of Mobile offered by the defendant.

Trans., p. 51.

29. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness William Barnewall, viz: "Did you ever have charge and control of said lands?"

Trans., p. 51.

30. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the defendant's question to said witness, Barnewall, viz: "Did you or not ever drive piling in front of this land which is marked 'Emanuel est.,' being the same sold to the transportation company by your wife?"

Trans., p. 51.

31. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "When was it you drove those pilings?"

Trans., p. 52.

32. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "Did you or not pay taxes on the lands that were sold by your wife to the Mobile Transportation Company?"

Trans., p. 52.

l 33. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, viz: "Look at the copy of the tax-list, Exhibit 'B,' and state whether or not the land described in there," etc., "was the land sold to the transportation company by witness's wife."

Trans., p. 52.

34. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "Whether or not the property assessed in Exhibit 'C' to Mary E. Barnewall is the same property sold by her to the transportation company."

Trans., p. 52.

35. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's offer of the oral evidence of Mr. Barnewall, John Hogan, and others tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right, for twenty years before the bringing of this suit.

Trans., p. 53.

36. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness D. M. N. Ross, viz: "Please examine the field-notes from the office of the secretary of state at Montgomery, Alabama, as shown by the copy made April 27, 1894, of section 38, township 4 south, range 1 west, St. Stephens land district of Alabama, and state whether or not the land just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south, and north boundaries are concerned."

Trans., p. 52.

37. In affirming the action of said circuit court in sustaining the objection of the plaintiff to and in excluding defendant's question to said witness, Ross, viz: "State is there such a thing known on the river front as a fixed high-water-mark line on the land sued for."

Trans., p. 54.

m 38. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the answer of said witness, viz: "I know the ballast was valuable for filling in."

Trans., p. 54.

39. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Whether there had been any filling done on the property marked on the map 'Emanuel estate.'"

Trans., p. 54.

40. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to

said witness, Ross, viz: "How long ago did you first notice any filling upon the part marked 'Emanuel'?"

Trans., p. 54.

41. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "Whereabouts did Barnewall drive piling in front of the Emanuel part?"

Trans., p. 54.

42. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Are there or not wharves in front of this land described in the complaint?"

Trans., p. 55.

43. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, Ross, viz: "Is there not the bed of a railroad track—is there not the grading of a railroad track upon this land described in the complaint?"

Trans., p. 55.

44. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding defendant's question to said witness, viz: "How long ago was that grading for a railroad track built?"

Trans., p. 55.

45. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the witness John Hogan, viz: "Did you ever make any improvements on that marked 'John Hogan'?"

Trans., p. 55.

46. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding defendant's question to said witness, Hogan, viz: If he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map.

Trans., p. 56.

47. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to the said witness, Hogan, viz: "What is the value of the improvements made by you upon the portion of the land lying east of the lots No. 1 and No. 4 on the map?"

Trans., p. 56.

48. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: Whether or not the improvements made by him on the portion of the land lying east of the land between the points

numbered one and four were made by him more than three years before the bringing of this suit.
Trans., p. 56.

49. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: Whether or not there were any improvements upon the lands marked on the map as "Emanuel."
Trans., p. 56.

50. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "How long ago said improvements were made."
Trans., p. 56.

51. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding the defendant's question to said witness, viz: "About what is the value of said improvements?"
Trans., p. 57.

52. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding from evidence the papers Exhibits "B," "C," "D," "E," "F," and "G," separately, offered by the defendant as matter of estoppel by record evidence.
Trans., p. 57.

53. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in excluding seriatim the evidence offered again by the defendant of the evidence before offered by it from volume 3 of the American State Papers, the field-notes of section-thirty-eight, the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probates of wills, and original deeds before offered in evidence and excluded seriatim for the purpose of showing color of title in the defendant to the lands described in the complaint.
Trans., p. 57.

54. In affirming the action of said circuit court in giving, at the request of the plaintiff, the following charge, viz: "The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff."
Trans., p. 57.

55. In affirming the action of said circuit court in sustaining plaintiff's objection to and in refusing defendant's charge, requested in writing, viz: "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark."
Trans., p. 58.

56. In affirming the action of said circuit court in sustaining the

plaintiff's objection to and in refusing to give the charge in
p writing requested by the defendant, viz: "The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31, 1867, was not under the water of Mobile river."

Trans., p. 58.

57. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in refusing the defendant's request that the court give the charge in writing, viz: "If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark."

Trans., p. 58.

58. In affirming the action of said circuit court in sustaining the plaintiff's objection to and in refusing the defendant's request to give the charge in writing, viz: "If the jury believe the evidence in this case they must find for the defendant."

Trans., p. 58.

EUGENE H. LEWIS &
FREDERICK G. BROMBERG,
Appellant's Attorneys.

q MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
CITY OF MOBILE, Defendant in Error. } Bond.

Know all men by these presents that we, the Mobile Transportation Company, as principal, and the National Surety Company of New York, of the city of New York, as surety, are held and firmly bound unto the above-named City of Mobile in the full sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seals this the 22nd day of February, A. D. 1901.

The conditions of the foregoing obligation are such that whereas the above-named Mobile Transportation Company has prayed for and obtained the issuance of a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of Alabama on the 20th day of December, A. D. 1900:

Now, therefore, if the above-named Mobile Transportation Company prosecute said writ of error to effect and pay and answer all such costs and damages as may be awarded against it in the Supreme Court of the United States should it fail to make good said appeal,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MOBILE TRANSPORTATION COMPANY, [SEAL.]
By FREDERICK G. BROMBERG, *Attorney.*
NATIONAL SURETY CO.
ROB'T E. STEINER, *Res'd't Vice-Pres't,* [SEAL.]
Attest: By J. W. KELLY, *Res'd't Ass't Sec'y.*

{ Seal National Surety Company, New York. Incorporated 1897. }

This bond is approved by me this the 22nd day of February, 1901.

T. N. McCLELLAN,
Chief Justice Supreme Court of Alabama.

7 MOBILE TRANSPORTATION COMPANY, Plaintiff in Error,
vs.
THE CITY OF MOBILE, Defendant in Error.

And now comes The Mobile Transportation Company, the plaintiff in error in the above-entitled cause, and prays the Supreme Court of the United States to reverse the decision of the supreme court of Alabama in the above-entitled cause on account of the errors specifically pointed out in the assignments of error, which are herewith presented.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Attorneys for Plaintiff in Error.

8 In the Supreme Court of Alabama, First Division.

THE MOBILE TRANSPORTATION COMPANY, Appellant,
vs.
THE CITY OF MOBILE, Appellee. } No. 953.

It is certified that this the supreme court of Alabama is the State court of last resort and the highest court of law in the State of Alabama to which the matter presented by the annexed record can be presented or in which a decision can be had.

It is further certified that the judgment of affirmance rendered in this cause by this court on the 20th day of December, A. D. 1900, is the final judgment in said action; that by said judgment this court affirmed the judgment of the circuit court of Mobile county, Alabama, which was rendered by said circuit court in an action of ejectment in a cause in said court wherein The City of Mobile, a municipal corporation in Alabama, appellee in this court, was plaintiff, and The Mobile Transportation Company, a corporation organized under the laws of Alabama, the appellant in this court, was defendant; that said plaintiff below sued the said defendant "to recover possession of the following tract of land, situate in the city and county of Mobile and State of Alabama, and more particularly de-

scribed as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract, where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of Water street, measured on said boundary lines, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point *t* on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, of which it was in possession, and upon which, pending such possession before the commencement of this suit, the defendant entered and unlawfully withholds, together with one thousand dollars for the detention thereof."

It is further certified that plaintiff relied for the recovery in said cause upon the following acts:

1. The act of Congress entitled "An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States," approved March 2, 1819, as printed in the Code of Alabama of 1876, at pages 40 to 42.

2. The resolution of Congress of the United States of America, December 14, 1819, as it appears in 3 U. S. Statutes at Large, page 608.

3. The ordinance of the convention of Alabama, done in convention at Huntsville, on the 2nd day of August, in the year of our Lord one thousand eight hundred and nineteen, as printed in the Code of Alabama 1876, at pages 68 and 69, which is as follows, viz:

"This convention, for and in behalf of the people inhabiting this State, do accept the proposition offered by the act of Congress, under which they are assembled; and this convention, for and in behalf of the people inhabiting this State, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this State; and that the same shall be and remain at the sole and entire disposition of the United States, and, moreover, that each and every tract of land, sold by the United States after the first day of September next, shall be and remain exempt from any tax, laid by the order or under the authority *u* of this State, whether for State, county, township, parish, or any other purpose whatsoever, for the term of five years from and after the respective days of sales thereof; and that the lands belonging to the citizens of the United States, residing out of the limits of this State, shall never be taxed higher than the lands belonging to persons residing therein; and that no tax shall be imposed on the property of the United States; and that all navigable waters within this State shall forever remain public highways, free to the

citizens of this State and of the United States, without any
duty, impost, or toll therefor, imposed by this State: and
ordinance is hereby declared irrevocable, without the consent of
United States.

Done in convention at Huntsville, this second day of August
the year of our Lord one thousand eight hundred and nineteen,
of American Independence the forty-fourth.

J. W. WALKER,
President of the Convention

Attest: JOHN CAMPBELL, *Secretary.*"

4. The act entitled "An act granting to the city of Mobile
riparian rights in the river front," approved January 31, 1
page 307 of the Acts of Alabama of 1866–7, which is as follows,

"SECTION 1. Be it enacted by the senate and house of repres
atives of the State of Alabama in General Assembly convened, T
the shore and the soil under Mobile river, situated within
boundary lines of the city of Mobile, as defined and set forth
section two of 'An act to incorporate the city of Mobile,' appro
February 2, 1866, be, and the same is hereby granted and delive
to the city of Mobile.

SEC. 2. Be it further enacted, That the mayor, aldermen and c
mon council of the city of Mobile be, and are hereby created
declared trustees to hold, possess, direct, control and manage
shore and soil herein granted, in such manner as they may de
best for the public good."

5. The act entitled "An act to fix the right of the city
Mobile to certain real estate," page 815, Acts of Alabama
1894–5, which is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of Alaba
That the absolute and unconditional title and right to all
estate, rights and easements, pertaining, or incidental, to any
estate, or any right therein, or thereto, heretofore vested in the bo
of aldermen and common council of the city of Mobile, or
the port of Mobile, or in the present city of Mobile, whet
held in trust, or otherwise, except such as have heretofore vested
the trustee for the holders of the bonds of the city of Mobile,
hereby vested absolutely, and unconditionally in the city of Mob
to be by it held, managed, controlled, and disposed of, as to it m
seem best.

SEC. 2. Be it further enacted, That the said city of Mobile be, a
is hereby authorized and empowered to contract and arrange wi
such person, or persons, as it may think proper, upon such terms
may seem best to it, for the ascertainment, location, and recovery of a
part, or the whole, of such property, and the rights hereby vest
in it, and may, if it thinks proper to do so, convey to such pers
or persons, an interest in said property, and rights, as compensati
for his, or their services in such matters.

Approved February 18th, 1895."

6. The act entitled "An act to amend an act entitled 'An act
fix the right of the city of Mobile to certain real estate,' approv

February 18th, 1895," approved December 5th, 1896, page 49, Acts of Alabama 1896–'7, which is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895, be, and
w the same is hereby amended so as to read as follows:

SECTION 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SEC. 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it and may, if it thinks proper to do so, convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters."

7. The act entitled "An act to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," approved 2nd day of February, 1866. Acts of Ala. 1866, p. 202.

x It was admitted that the defendant was in the possession of the lands sued for, and that said lands were in the city of Mobile.

The defendant, before the trial, suggested upon the record that it and those whose possession it has have, for three years next before the commencement of the suit, had adverse possession thereof.

It is further certified that the statute in force at the time of the trial of said cause is as follows, viz:

"2702 (2951). Suggestion of adverse possession for three years; proceedings on.—When a suit is brought to recover land or the possession thereof, the defendant may, at any time before the trial, suggest upon the record that he and those whose possession he has, have, for three years next before the commencement of the suit, had adverse possession thereof. In such case, if the jury find for the plaintiff, they must also ascertain by their verdict whether such suggestion be true or false."

"2703 (2952). Verdict and judgment on suggestion.—If they find it to be false, they must return a verdict for the damages as in ordinary cases. If they find it to be true, they must assess the value, at the time of trial, of the permanent improvements made by the defendant, or those whose estate he has, and also ascertain by their

verdict the value of the lands, and of the use and occupation thereof, not including the increased value by reason of such improvements; if the value of the use and occupation as assessed exceed the value of the permanent improvements made, judgment must be rendered against the defendant for the excess."

y The defendant pleaded the statute of limitations of twenty years and of ten years.

It is certified that the statute of limitations of Alabama of twenty years and ten years were respectively as follows:

"2474. Civil suits must be commenced after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2475. Within twenty years:

1. Actions at the suit of the State of Alabama against a citizen thereof, for recovery of real and personal property.

2. Actions upon a judgment or decree of any court of the State of Alabama, of the United States, or of any State or Territory of the United States."

Code 1852.

"2612 (3223). Limitation of actions.—Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2613(3224). Limitation of twenty years.—Within twenty years,—

1. Actions at the suit of the State against a citizen thereof, for the recovery of real or personal property.

2. Actions by or for the use of any township, for the recovery of sixteenth section or other school lands belonging to the township.

3. Actions upon a judgment or decree of any court of this State, of the United States, or of any State or Territory of the United States."

Code 1886.

"2476. Within ten years:

1. Actions founded upon any contract, or writing under seal.

z 2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof.

3. Motions, and other actions, against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office."

Code 1852.

"2614 (3225). Limitation of ten years.—Within ten years,—

1. Actions founded upon any contract or writing under seal.

2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as herein otherwise provided.

3. Motions and other actions against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office."

Code 1886.

It is further certified that defendant objected to the introduction of the said act of the General Assembly of Alabama approved December 31, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front."

3. Because the act is void as being *ultra vires*, because the State is a trustee of the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on a navigable river includes the shore or bank of such river and extends to the water line at low water; because accretions belong to the riparian owner.

aa 5. Because whatever *the* rights the city of Mobile may have acquired under such act are now vested in the trustee for the bondholders of Mobile under the act to vacate and annul the charter of Mobile, approved February 11, 1879, page 381, Pamp. Acts of Ala. 1878–79.

6. Because the plaintiff is no longer in existence, because its existence was terminated by the act to provide a charter for the city of Mobile, approved Feb. 6, 1897, page 542, Pamp. Acts of Ala. 1896–97.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitations of twenty years.

8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant: the suit is for land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act."

It is further certified that section 1 of the act referred to in objection 5, entitled "An act to vacate and annul the charter of Mobile," approved February 11, 1879, page 381, Pamp. Acts of Ala. 1878–79, is as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of *bb* Alabama, That the act entitled 'An act to consolidate' the several acts of incorporation of the city of Mobile, and to alter and amend the same,' approved February 2, 1866, and all acts of a date subsequent thereto altering and amending the said act, and all other acts incorporating the city of Mobile, or in conflict, or inconsistent with the provisions of this act, be and the same are hereby repealed, and the corporation of the city of Mobile, known and styled as the mayor, aldermen, and common council of the city of Mobile, is hereby dissolved and abolished."

It is further certified that sections 52 and 53 of the act referred to in objection numbered 6, entitled "An act to provide a charter for the city of Mobile," approved February 6, 1897, Pamp. Acts of Ala. 1896–7, page 581, are as follows, viz:

"SEC. 52. Be it further enacted, That this act shall take effect and be enforced from and after its approval, except that the present incumbents of the respective offices in said city shall continue to perform the duties thereof and receive the emoluments thereof, until their successors have been elected and qualified under the provisions of this act.

SEC. 53. Be it further enacted, That all laws and parts of laws in conflict with this act, be and the same are hereby repealed."

It is further certified that defendant offered evidence for the purpose of showing that it owned the lands sued for in fee-simple by an unbroken chain of deeds from the original patentees of
cc the United States, the assignees of Regis Bernoudy, claiming under a Spanish grant made March 3, 1792, to Joseph Gaspar Munora; and also offered oral evidence to show the adverse possession of the lands described in the complaint, notoriously, continuously, adversely, under a color of right, for twenty years before the bringing of this suit; all of which evidence was excluded by the court below, and such exclusion was affirmed by this court.

It is further certified that defendant claimed under the treaty of 1819 between the United States and Spain, as printed in the United States Statutes at Large, in the volume entitled "Revised Statutes Relating to District of Columbia and Post-roads, Public Treaties" (Forty-third Congress, 1873 to 1875), at pages 712 to 718, inclusive, and especially under article VIII of said treaty, as it appears on page 714 of said volume, as follows, viz:

"All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the person in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolution in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void."

dd It is further certified that the portions of volume 3 of the American State papers entitled "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834, selected and edited under the authority of the Senate of the

United States, by Walter Lowrie, secretary of the Senate," relating to the claim of Regis Bernoudy, are as follows, viz:

(Page 29.)

"Register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident."

* * * * * * *

(Page 30.)

"Number —, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph Munora.
Where situated, Mobile river.
Quantity claimed, area in arpens, 600.
Cultivation and inhabitation, from 1809 to 1813."

* * * * * * *

(Page 31.)

(Signed) WILLIAM CRAWFORD,
Commissioner.

REMARKS.—Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims to such lands, not exceeding a reasonable quantity, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

(Signed) "WILLIAM CRAWFORD,
"*Commissioner.*"

* * * * * * *

(Page 400.)

"No. 9.

Report on the conflicting claims of Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claims the former commissioner reported favorably.

Former Commis's Report.

No. of report, 10.
No. of claim, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph S. Murona.
Nature of claim and from what authority derived, spa. pert. or cert. from commandant; grant lost by time or accident.
Date of claim, 3 March, 1792.
Quantity claimed, area in arpens, 600.
Where situated, Mobile river.

By whom issued, Carondelet.
Surveyed, no survey.
Cultivation and inhabitation, from 1809 to 1813."

* * * * * *

"Report 10, claim 11.—The claim of Regis Bernody is founded on a conveyance made to him by Joseph Gaspar Munora, at Pensacola, which passed through the office of the commandant, as all authentic conveyances must have done in the Spanish posts of the intendancy, and recognizes the original grant or concession of the same made by the Baron de Carondelet in favor of said Munora on the 3d March, 1792, which grant was produced by Munora on the day of the execution of the conveyance to Bernody. The proof of the inhabitation and cultivation by Bernody (until forcibly expelled by McCandless) is complete, and the inference is strong that Munora, the grantee, did comply with the essential conditions of the grant, inasmuch as the instructions of Morales expressly charge the 'notaries and commandants not to pass any conveyance of lands where the conditions of the grant were not previously proven to have been complied with; and, independently of this consideration, the declaration of Munora, in the conveyance to Bernody, that it was "the same land that Antonio Espejo worked with his permission," made, too, at a time when it could not be imagined that any rival claim would arise, furnishes a violent presumption that the land was inhabited or cultivated by or for Munora agreeably to the Spanish regulations. A full report of all the evidence presented by the conflicting claimants is herewith presented.

Upon the best view we have been able to take of the relative merits of these claims, we are decidedly of opinion that the claim of Joseph McCandless ought to be rejected, and that of Regis Bernody confirmed.'

W. BARTON, *Register.*"

It is further certified that section 25 of the act entitled "An act to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," approved 2d February, 1866, is as follows, viz:

"SEC. 25. Be it further enacted, That there shall be an officer called the city tax assessor, and that the city tax assessor elected on the 9th day of January, 1866, in and for the city of Mobile, shall hold his office for the term of three years from the first day of January, 1866, except when a vacancy shall occur in the said office of assessor, by death, resignation, or removal, in which event an assessor shall be elected, who shall hold his office from the date of his election to fill such vacancy for the unexpired term of his predecessor, and that said assessor shall be elected by the mayor, aldermen and common council of said city every three years thereafter; that said assessor shall hold his office in the municipal buildings of said city, devote his entire time and attention to the duties appertaining to his said office of assessor, and that the books and papers relating to his said office shall at all proper times be kept open to public inspection; that once in each year, under such regulations and in

such periods of time as the said corporate authorities may from time to time ordain and appoint, the said assessor shall make an assessment of all the property in said city liable to be assessed, and that for the performance of the duties of his said office the said assessor shall be compensated in such manner, and to such an extent, as the said corporate authorities may from time to time ordain and establish, but in no case to be changed during the official term of any assessor."

gg It is further certified that the defendant offered in evidence said treaty of Spain and so much of volume 3 of American State Papers, entitled "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834, selected and edited under the authority of the Senate of the United States, by Walter Lowrie, secretary of the Senate," as forms part of the "register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident," and relates to the claim of Regis Bernoudy, numbered "11" on page 30 of said printed volume; and also so much of said volume as report numbered "9," entitled "Report on the conflicting claims of *of* Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

Pages 401, 402.

It is further certified that the defendant also offered in evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignee of Regis Bernoudy, dated 28th day of December, 1836, which is as follows, viz:

"The United States of America to all to whom these presents shall come, Greeting:

Know ye, that George Poe, Junior, William H. Robertson and Philip McLosky assignee of Regis Bernoudy, having deposited in the General Land Office a certificate numbered six of the register and receiver of the land office at St. Stephens, Alabama, whereby it appears that by the second section of the act of Congress approved on the third day of March one thousand eight hundred and nineteen entitled 'An act for adjusting the claims to land and
hh establishing land offices in the districts east of the island of New Orleans,' and of the second section of the act of Congress approved on the eighth day of May one thousand eight hundred and twenty-two entitled 'An act supplementary to the several acts for adjusting the claims to land and establishing land offices in the districts east of the island of New Orleans' the claim of Regis Bernoudy in right of Joseph S. Munora, entered as number eleven in abstract number ten of the reports of Commissioner Crawford, and as number two in report number nine of the register and receiver, was confirmed, and has been surveyed as section thirty-

eight in township four, south, of range one west, containing five hundred and seven acres and seventy-six-hundredths of an acre, in the district of lands subject to sale at St. Stephens, Alabama.

There is therefore granted by the United States, unto the said George Poe, Junior, William H. Robertson, and Philip McLosky, as assignees of Regis Bernoudy, and to their heirs, the tract of land above described. To have and to hold the said tract of land above described, with the appurtenances, unto the said George Poe, Junior, William H. Robertson, and Philip McLosly as assignees of Regis Bernoudy and to their heirs and assigns forever.

In testimony whereof, I, Andrew Jackson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the [L. S.] twenty-eighth day of December, in the year of our Lord one thousand eight hundred and thirty-six and the Independence of the United States, the sixty-first.

By the President:

ANDREW JACKSON,
By A. JACKSON, Jun'r *Sec'y.*

HUDSON M. GARLAND,
Recorder of the General Land Office."

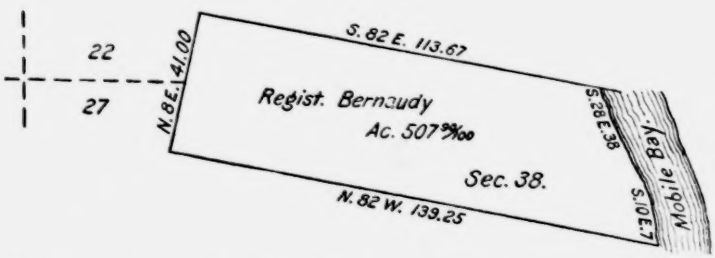
ii Also the field-notes as follows:

"Comr. rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Alabama.

Comr. rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Ala.



Pursuant to an order from the principal deputy surveyor of the land district east of the island of New Orleans and in conformity with a certificate No. — from the commissioners appointed under the authority of the act of Congress of April 25th, 1812, and recognized by a subsequent act approved March 3rd, 1819, I have surveyed a tract of land claimed by Regis Bernody on Mobile river, in

the State of Alabama, being section No. 38, in township No. 4 of range No. 1 west of the basis meridian, and south of the 31st degree of latitude, and bounded as follows: Beginning at the southwest corner of this tract, being 7.55 east of the N. W. corner of the Forbes tract, and designated by the following marks: A pine bears N. 45 E. 92 links and marked XIII; thence N. 8 E. 41.00 to a post on the south boundary line of the Favre tract at the distance of 2.69 chs. east of the S. W. corner of the Favre tract, from which a pine bearing N. 45 E. 99 links and marked XIII; thence S. 82 E. 113.67 to a post on the Mobile river; thence down the river with its meanders S. 28 E. 38.00, S. 10 E. 7.00, S. 4 W. 4.00 to a post on the south boundary line; thence N. 82 W. 139.25 to the place of beginning, containing 507 acres and 76 hundredths of an acre and having such shape, form, and marks, natural and artificial, as are represented in the above plat and description the 22nd day of January, 1835.

(Signed) JOHN JAMES,
Deputy Surveyor.

Examined and approved 29th June, 1835.

JAS. H. WEAKLEY,
Surveyor U. S. Lands in Alabama."

kk All of which evidence was excluded and all of which offers of evidence were excluded by the circuit court of Mobile county, and the action of the circuit court in such exclusion and refusal was affirmed by this court.

It is further certified that it is enacted in the Code of Alabama of 1852 and was in force January 31, 1867, as follows, viz:

"SEC. 1205. All navigable waters in this State are public highways."

It is further certified that it is enacted in the constitution of the State of Alabama, as revised and amended by the convention assembled at Montgomery the 12th day of September, 1865, as follows:

Article I.

"SEC. 25. That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, and, for works of internal improvement, the right to establish depots, stations, and turnouts; but just compensation shall, in such cases, be first made to the owner."

"SEC. 36. This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights hereby retained, or any transgression of any of the high powers by this constitution

delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.

Article IV.

"SEC. 2. All laws shall be passed by original bill; and their style shall be, 'Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened.' Each law shall embrace but one subject, which shall be described in the title; and no law, or any section of any law shall be revised or amended by reference only to its title and number, but the law or section revised or amended shall itself be set forth at full length."

Code 1876, pp. 90, 91.

It is further certified that it is enacted in the constitution of Alabama which became operative June 25, 1868, as follows:

Article I.

"SEC. 25. That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, and turnouts, but just compensation shall, in all cases, be first made to the owner."

"SEC. 26. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost or toll imposed; and that no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by the General Assembly."

Code 1876, p. 103.

It is further certified that it is enacted in the present constitution of the State of Alabama, which became operative December 6, 1875, as follows, viz:

Article I.

"SEC. 24. That the exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals. But private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations,

other than municipal, without the consent of the owner; provided, however, that the General Assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscriptions for the benefit of railroads or any other kind of corporations other than municipal, or for the benefot of any individual or association."

"SEC. 25. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by law."

Code 1886, page 23.

It is further certified that the circuit court directed the jury
nn to find a judgment for the plaintiff upon the evidence, and refused the defendant's request that the jury be directed to find for the defendant upon the evidence.

This court affirmed the judgment of the court below in all respects.

The defendant claimed that the action of the circuit court and of this court violated the contract between this State and the United States, evidenced by said ordinance of said State of Alabama of August 2, 1819, and said resolution of Congress admitting the State of Alabama into the Union; and that it violated the contract of the State of Alabama with the defendant, as a citizen of Alabama, that Mobile river should remain to it, as a citizen of Alabama and as a riparian owner of land upon its shore, forever free as a public highway, and that the titles, rights, privileges, and immunities claimed by those under whom the defendant claims, under the said treaty and under the said patent of the United States, and the statutes of the United States recited therein are abridged and violated by said judgments; and that the said treaty, patent of the United States, and the statutes therein recited and the authority exercised thereunder by those under whom the defendant claims are drawn in question by said judgments and adversely to the validity and authority thereof, and the decisions of the said circuit court and of the supreme court are against the said titles, rights, privileges, and immunities and against the authority of such treaty, statutes, and patent.

And, further, the defendant claims that it has been deprived by said judgment of this court of its property without compensation first made therefor and without due process of law, and that the decree of the supreme court of Alabama was adverse to this contention of defendant and appellant, and there was therefore drawn in question and decided adversely to the defendant and appellant a title,

right, privilege, or immunity claimed by the defendant
oo under the Constitution of the United States of America, and this certificate is made a part of the record.

Done this the 22nd day of February, A. D. 1901.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

pp In the Supreme Court of Alabama, First Division.

MOBILE TRANSPORTATION COMPANY, &c., Appellant,
vs.
CITY OF MOBILE, &c., Appellee. } No. 953.

This the 22nd day of February, A. D. 1901, came the plaintiff in error, The Mobile Transportation Company, and filed herein and presented to me, Thomas N. McClellan, the chief justice of the supreme court of Alabama, its petition praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered by the supreme court of Alabama, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be necessary in the premises.

On consideration whereof the said writ of error is hereby allowed upon the appellant, The Mobile Transportation Company, giving bond according to law in the sum of one thousand ($1,000.00) dollars, which bond being forthwith given and approved, let the writ of error issue as prayed for.

Made this the 22nd day of February, A. D. 1901.

T. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

1 A transcript of the record and proceedings had in a certain cause pending in the circuit court of Mobile county, Alabama, therein lately pending, wherein The City of Mobile, a municipal corporation in Alabama, was plaintiff, and The Mobile Transportation Company, a corporation organized under the laws of Alabama, was defendant.

Complaint.

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court, Fall Term, 1896.

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

The plaintiff sues to recover possession of the following tract of land, situate in the city and county of Mobile and State of Alabama and more particularly described as follows, viz:

Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet each of the west line of Water street, measured on said boundary lines, thence south eighty-two degrees east four hundred feet, more or less, to the channel/ line adopted by the Mobile River commission; thence northwardly along said channel/ line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, of which it was in possession, and upon which, pending such possession before the commencement of this suit, the defendant entered and unlawfully withholds, together with one thousand dollars for the detention thereof.

GREGORY L. & H. T. SMITH,
Att'ys for Plaintiff.

2 *Summons.*

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court, Fall Term, 1896.

To any sheriff of the State of Alabama:

You are hereby commanded to summon the Mobile Transportation Company, a corporation, to appear at the next term of the circuit court to be held for said county on the first Monday in January, 1897, at the place of holding the same, then and there to answer the complaints of the City of Mobile, a municipal corporation in Alabama.

Witness B. F. Jackson, clerk of said court, this fourteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Issued the fourteenth day of December, 1896.

Attest: B. F. JACKSON, *Clerk.*

Sheriff's Return.

Received December 14th, 1896, and on the same day I served a copy of the within complaint and summons on C. L. Huger, as president of the Mobile Transportation Company, a corporation.

CHAS. E. McLEAN, *Sheriff,*
By GEO. E. HOLT, *D. S.*

Motion to Dismiss Cause Unless Security for Costs be Given.

STATE OF ALABAMA, }
Mobile County. }

In the Circuit Court of Mobile.

CITY OF MOBILE, a Corporation,
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597. Motion.

The defendant moves the court to dismiss the summons and complaint unless the plaintiff shall give security for costs in this cause

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office Feb'ry 26th, 1897.

B. F. JACKSON, *Clerk.*

Order: Motion Overruled.

At a regular term of the circuit court of Mobile county, State of Alabama, begun and held in the city of Mobile on the 19th
3 day of April, A. D. 1897, the same being the fourth Monday after the fourth Monday in March, A. D. 1897, the Honorable William S. Anderson, judge of the thirteenth judicial circuit of the State of Alabama, present and presiding, and on the 30th day of April, A. D. 1897, the same being the regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Motion Overruled.

This day came the parties, by their attorneys, and the defendant's motion to dismiss cause unless security for costs be given coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the defendant's said motion be, and the same is hereby, overruled.

Demurrers.

THE STATE OF ALABAMA, }
Mobile County. }

In the Circuit Court.

CITY OF MOBILE, a Corporation,
vs.
THE MOBILE TRANSPORTATION COMPANY, &c. } No. 8597. Demurrer.

1. The defendant demurs to the complaint, and for cause of demurrer shows that the complaint shows on its face that the plaintiff is not in existence.

2. For further cause of demurrer defendant shows that the charter of the plaintiff was repealed February 6th, 1897, and that plaintiff is not in existence.

3. For further cause of demurrer defendant shows that the complaint shows no right in the plaintiff to sue for the recovery of lands described therein.

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office March 18, 1897.

B. F. JACKSON, *Clerk.*

Order on Demurrers.

And on the 26th day of April, 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	Demurrers Overruled & Def't Excepts. Defendant Allowed Ten Days to File Pleas.

4 This day came the parties, by their attorneys, and the demurrers to complaint coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the demurrers and complaint be, and they are hereby, overruled; and it is further ordered by the court that the defendant be, and he is hereby, allowed ten days to file pleas.

Motion, &c.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY.

The defendant moves the court to require the attorneys who appear for the plaintiff to show the authority by which they so appear, because they are not the city attorney, but the city attorney is B. B. Boone, Esqr.

April 19th, '97.

FRED'K G. BROMBERG,
Att'y for Defendant.

G. L. & H. T. SMITH, *Contra.*

Motion Granted, &c.

And on the 26th day of April, A. D. 1897, it being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO.

Motion granted and pl'ff's att'y makes oath in open court that his said firm was employed by pl'ff to bring said suit, & court held that said oath was sufficient compliance with the order granting motion, and def't excepted to said holding.

This cause coming on to be heard upon motion of the defendant to require the attorneys to appear for the plaintiff to show the authority by which they so appear, and argument of counsel having been heard, it is considered and adjudged by the court that said motion be granted, and thereupon came Harris T. Smith, one of the attorneys who appear for the plaintiff, who, being duly sworn in open court, says that the City of Mobile employed the firm of G. L. & H. T. Smith to bring the present suit under the provisions of the act entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 6th, 1896, which appears in the Acts of Alabama 1896–'97, at pages 49 & 50.

Thereupon it was considered and adjudged by the court that said oath of H. T. Smith, Esquire, was sufficient evidence of the authority of G. L. & H. T. Smith, Esquires, to appear for the plaintiff; whereupon the defendant excepted to the action of the court in adjudging that said oath of H. T. Smith, Esquire, is sufficient evidence of the authority of G. L. & H. T. Smith, Esquires, to appear for the plaintiff.

Pleas.

In the Circuit Court of Mobile.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597. Pleas.

1. The defendant, for answer to the complaint, saith that it is not guilty of the matters alleged therein.

2. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery of this cause, says that it relied upon title as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights and the river front, approved January 31st, 1867." Pamp. Acts of Alabama 1866–'67, page 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895." Pamp. Acts Ala. 1894–'5, p. 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 5th, 1896.

And defendant says that said abstract of titles shows on its face that the plaintiff has no right to the possession of said lands, for the recovery of the possession of which this suit is brought.

3. For a further plea to the complaint the defendant saith that the plaintiff, in reply to the defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitu-
6 tion and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Alabama, August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile riparian rights in the river front, approved January 31st, 1867." Pamph. Acts Ala. 1866–'67, p. 307.

d. The acts of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895." Pamph. Acts 1894–'95, page 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18, 1895," approved December 5th, 1896.

And defendant says that said abstract of title shows on its face that the plaintiff had no legal title to the lands for the recovery of the possession of which this suit is brought.

4. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government for the admission of such States into the Union on an equal footing with the original States," approved March 2, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights in the river front, approved January 31st, 1867." Pamph. Acts Ala. 1866–'67, p. 307.

d. The acts of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18, 1895," Pamph. Acts Ala. 1894–5, p. 815.

e. The act of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18th, 1895," approved December 5th, 1896.

And defendant says the original summons and complaint in this cause issued out of this court December 14th, 1896, and defendant says that said abstract shows on its face that the plaintiff in
7 said complaint had ceased to exist and had no standing in this court to sue for the recovery of the lands for which this suit is brought at the time this suit was brought.

5. For a further plea to the complaint the defendant saith that the plaintiff, in reply to the defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of the United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing *of* the original States," approved March 2, 1819.

b. The ordinance of the constitutional convention of Alabama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city of Mobile the riparian rights in the river front, approved January 31st, 1867." Pamph. Act- Ala. 1866–7, p. 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895," Pamph. Acts Ala. 1894–5, p. 815.

e. The acts of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate,' approved February 18, 1895," approved December 5th, 1896.

And defendant says that the plaintiff and those under whom it claims to hold in privity the lands described in the complaint for more than twenty years before the commencement of this suit, to wit, December 14th, 1896, demanded and collected taxes assessed by the plaintiff and by those under whom it claims against the land described in the complaint. Wherefore the defendant says the plaintiff is now barred by the statute of limitation of twenty years.

6. For a further plea to the complaint the defendant saith that the plaintiff, in reply to defendant's demand for an abstract in writing of the title or titles on which the plaintiff relies for a recovery in this cause, says that it relies upon titles as follows:

a. The act of the Congress of United States entitled "An act to enable the people of Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States," approved March 2nd, 1819.

b. The ordinance of the constitutional convention of Ala-
8 bama of August 2nd, 1819.

c. The act of Alabama entitled "An act granting to the city

of Mobile the riparian rights in the river front, approved January 31, 1867." Pamph. Acts Ala. 1866–7, p. 307.

d. The act of Alabama entitled "An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895." Pamph. Acts Ala. 1894–5, p. 815.

e. The act of Alabama entitled "An act to amend an act entitled 'An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895,' approved December 5, 1896."

And defendant says that the plaintiff and those under whom it claims to hold in privity the lands described in the complaint for more than ten years before the commencement of this suit, to wit, December 14th, 1896, demanded and collected taxes assessed by the plaintiff and by those under whom it claims against the land described in the complaint. Wherefore defendant says the plaintiff is now barred by the statute of limitations of ten years.

FREDK G. BROMBERG,
Defendant's Attorney.

Filed in office May 1st, 1897.

B. F. JACKSON, *Clerk.*

Motion to Strike Pleas from File.

Circuit Court of Mobile County.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

Now comes the plaintiff in the above-entitled cause and moves the court to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pleas by the defendant pleaded:

1st. Because each of said pleas are frivolous.

2nd. Because none of said pleas contain the gist of defense to the said action.

3rd. Because every defense which the defendant is entitled to set up in this case is available to it under the general issue set up in the first plea by the defendant pleaded.

4th. And because, having pleading the general issue, the defendant is not entitled to plead specially.

GREGORY L. & H. T. SMITH,
Attorneys for Plaintiff.

Files in office May 5th, 1897.

B. F. JACKSON, *Clerk.*

9 *Motion Granted.*

And on the 10th day of May, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Motion Granted and Def't Excepts.

This day came the parties, by their attorneys, and the plaintiff's motion to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pleas by the defendant pleaded coming on to be heard and being argued by counsel and understood by the court, it is ordered and adjudged by the court that the plaintiff's said motion be, and the same is hereby, granted and to which rulings of the court the defendant excepts.

Order, &c.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO.

Defendant suggests on the record that it and those whose possession it has for three years next before the commencement of this suit had adverse possession of the lands described in the complaint.

This day came the parties, by their attorneys, and the defendant suggests on the record that it and those — possession it has have for three years next before the commencement of this suit had adverse possession of the land described in the complaint.

Motion to Withdraw Plea and File Demurrers.

In the Circuit Court of Mobile, Alabama.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

The defendant moves the court to be allowed to withdraw the plea of general issue and file the demurrers to the complaint heretofore filed in this cause on this day.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in open court June 1st, 1897.

B. F. JACKSON, *Clerk.*

Motion Granted.

And on the 4th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

10 THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY.

Motion of def't to withdraw plea & file demurrers granted & def't taxed with all the costs that have accrued up to this time, same to be paid in thirty days.

This day came the parties, by their attorney-, and the defendant's motion to withdraw plea and file demurrers being argued by counsel and understood by the court, it is ordered and adjudged by the court that defendant's said motion to withdraw plea and file demurrers be, and the same is hereby, granted; and it is further ordered by the court that the defendant be, and he is hereby, taxed with all the costs that have accrued up to this time; same to be paid in thirty days.

Demurrers.

Circuit Court.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } No. 8597.

Comes the defendant and demurs to the plaintiff's complaint and as ground- of demurrer assigns each of the following:

1st. Because the lands sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State.

FRED'K G. BROMBERG,
Defendant's Attorney.

4th. Also because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

FRED'K G. BROMBERG,
C. L. BROMBERG,
Def't's Attorney-.

Refiled 3 o'clock p. m., June 4th, 1897.
B. F. JACKSON, *Clerk.*

Filed in office June 4th, 1897.
B. F. JACKSON, *Clerk.*

Demurrers Overruled.

And on the 4th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

THE CITY OF MOBILE *vs.* THE MOBILE TRANSPORTATION COMPANY.	Demurrers Overruled & Def't Excepts.

This day came the parties, by their attorneys, and the de-
11 fendant's demurrers to complaint filed in this cause June 4th, 1897, being argued by counsel and understood by the court, it is ordered and adjudged by the court that the said demurrers to complaint filed in this cause June 4th, 1897, being argued by counsel and understood by the court, it is ordered and adjudged by the court that the said demurrers to complaint be, and they are hereby, overruled, and to which ruling of the court defendant excepts.

Demurrers.

Circuit Court.

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	No. 8597.

Comes the defendant and demurs to the plaintiff's complaint and as grounds of demurrer assignes each of the following:

1st. Because the land- sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State.

FRED'K G. BROMBERG,
Defendant's Attorney.

4th. Also because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment.

FRED'K G. BROMBERG,
C. L. BROMBERG,
Def't's Attorney.

Filed in office June 4th, 1897.

B. F. JACKSON, *Clerk.*

Refiled 3 o'clock p. m., June 4th, 1897.

B. F. JACKSON, *Clerk.*

[Matter enclosed in rules. Written across the face in red ink: Error. Duplicate. B. F. Jackson, clerk, &c.]

Plea.

In the Circuit Court of Mobile.

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION COMPANY. } Plea.

For answer to the complaint the defendant saith that it is not guilty of the matters and things therein alleged.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in office June 5th, 1897.

B. F. JACKSON, *Clerk.*

12 *Jury and Verdict.*

And on the 5th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

We, the jury, find for the plaintiff for the lands described in the complaint, together with $65.00 for the detention thereof.

This day came the parties, by their attorneys, and, issue having been joined between the plaintiff and the defendant, thereupon came a jury of good and lawful men, to wit, A. E. Brown and eleven others, who, having been duly empanelled and sworn according to the law *who* having heard the evidence and the charge of the court, upon their oaths do say: "We, the jury, find for the plaintiff for the land as described in complaint and together with ($65.00) sixty-five dollars for the detention thereof."

It is therefore considered by the court that the plaintiff have and recover of the defendant the following tract of land described in the complaint as follows, viz., situated in the city and county of Mobile and State of Alabama, and more particularly described as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of Water street, measured on said boundary line, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of Sullivan Timber Company's wharf; thence north eighty-two degrees west three hun-

dred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, together with the sum of sixty-five ($65.00) dollars for the detention thereof, as so assessed by the jury, together with the costs in this behalf expended, for which let execution issue for said lands, together with the sum of sixty-five ($65.00) dollars for the detention thereof and all costs.

13 *Time for Filing Bill of Exceptions.*

And on the 5th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

THE CITY OF MOBILE, a Municipal Corporation,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation.

Def't allowed 60 days from adjournment of court within which to present bill of exceptions.

This day came the parties, by their attorneys, and upon motion of defendant it is ordered and adjudged by the court that the defendant be, and he is hereby, allowed 60 days from adjournment of court within which to present bill of exceptions.

Motion to Retax Costs.

In the Circuit Court.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597.

The defendant moves the court to retax the costs in this cause because the same are excessive in this: Costs of the witnesses summoned by the plaintiff as follows:

George A. Cleveland, Capt. Thos. Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennet; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, George Hayward, because none of said witnesses were examined.

Also because the witnesses named above were all called to prove one matter of fact, and to prove which the defendant had also summoned the witness D. M. N. Ross.

FRED'K G. BROMBERG,
Def't's Attorney.

Filed in office June 7th, 1897.

B. F. JACKSON, *Clerk.*

Order on Motion.

And on the 15th day of June, A. D. 1897, the same being another regular day of said term, it was ordered as follows in this cause, to wit:

CITY OF MOBILE
vs.
MOBILE TRANSPORTATION CO. } Motion Refused, and Def't Excepts.

This day came the parties, by their attorneys, and the defendant's motion to retax the costs in this cause of the following witnesses summoned by the plaintiff, viz., Geo. A. Cleveland, Capt.
14 Thos. Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, and George J. Wood, having been submitted to the court at a previous day of this term, together with all other papers in this case, after a careful consideration by the court, it is ordered and adjudged by the court that the defendant's motion be, and the same is hereby, refused, and to which ruling of the court defendant excepts.

Motion for a New Trial.

In the Circuit Court.

CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY ET AL.

The defendant moves the court to set aside the verdict and judgment heretofore rendered in this cause and to grant it a new trial for the following reasons:

1st. Because the court erred in overruling the first demurrer of the defendant to the complaint, filed March 18, 1897.

2nd. Because the court erred in overruling the second demurrer of the defendant to complaint, filed March 18th, 1897.

3rd. Because the court erred in overruling the third demurrer of the defendant to complaint, filed March 18, 1897.

4th. Because the court erred in overruling the first grounds of demurrer of the defendant to the complaint, filed June 4, 1897.

5th. Because the court erred in overruling the second grounds of demurrer of the defendant to the complaint, filed June 4th, 1897.

6th. Because the court erred in overruling the third grounds of demurrer of the defendant to the complaint, filed June 4, 1897.

7th. Because the court erred in overruling the fourth ground of demurrer of the defendant to the complaint, filed June 4, 1897.

8th. Because the court erred in striking out the second plea of defendant, filed May 1st, 1897.

9th. Because the court err-d in striking out the third plea of the defendant, filed May 1st, 1897.

10th. Because the court erred in striking out the fourth plea o
the defendant, filed May 1, 1897.

11th. Because the court erred in striking out the fifth plea of th
defendant, filed May 1, 1897.

12th. Because the court erred in giving the charges i
15 writing requested by the plaintiff.

13th. Because the court erred in giving oral charges give
to the jury in this cause.

14th. Because the court erred in instructing the jury to find fo
the plaintiff.

15th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "A."

16th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "B."

17th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "C."

18th. Because the court erred in refusing to give the charges i
writing requested by the defendant marked "D."

19th. Separately, because the errors of the court in excludin
offers of evidence by the defendant, and excluded by the court.

20th. Separately, to the overruling of each objection made by th
defendant to the testimony offered by the plaintiff.

21st. Separately, to the admission of the testimony offered by th
plaintiff in each case wherein objected to by the defendant.

FRED'K G. BROMBERG,
Defendant's Attorney.

Filed in office June 7th, 1897.

B. F. JACKSON, *Clerk.*

Motion Refused.

And on the 15th day of June, A. D. 1897, the same being anothe
regular day of said term, it was ordered as follows in thi
16 cause, viz:

CITY OF MOBILE *vs.* MOBILE TRANSPORTATION COMPANY.	Motion Refused, and Def Excepts.

This day came the parties, by their attorneys, and the defendant'
motion to set aside verdict and grant a new trial in this cause hav
ing been submitted to the court at a previous day of this term, to
gether with all other papers in this cause, after a careful considera
tion by the court, it is ordered and adjudged by the court that th
defendant's said motion be, and the same —, refused, and to whic
ruling of the court defendant excepts.

17 *Bill of Exceptions.*

In the Circuit Court, Spring Term, 1897.

THE STATE OF ALABAMA, }
Mobile County. }

Bill of exceptions.

Be it remembered that on the 26th day of April, A. D. 1897, being a day of the regular term of the circuit court of Mobile county, in a cause wherein The City of Mobile, a municipal corporation in Alabama, is plaintiff and The Mobile Transportation Company, a corporation organized under the laws of Alabama, is defendant, the following proceedings were had:

The defendant made the following motion in writing, viz:

"The defendant moves the court to dismiss the summons and complaint unless the plaintiff gives security for costs in this cause."

Said motion coming on to be heard, having been argued by counsel, submitted for the ruling of the court on April 26, 1897, and the court on May 3rd, 1897, made an order denying said motion.

The defendant further made on April 19th, 1897, the following motion in writing, viz:

"The defendant moves the court to require the attorneys who appear for the plaintiff to show the authority by which they so appear, because they are not the city attorney, but the city attorney is B. B. Boone, Esquire."

Said motion having come on to be heard and defendants introduced no evidence in support of the motion, but in opposition to the motion Harry T. Smith, Esquire, was sworn as a witness and testified that he was a member of the firm of Gregory L. and H. T. Smith, the attorneys of record for plaintiff in this cause, and that his said firm was in fact employed by plaintiff to bring said suit; and the same having been argued by counsel, the court made the following order in writing, viz:

"April 26th, motion granted and plaintiff's attorney makes oath in open court that his said firm was employed by plaintiff to bring said suit, and the court held said oath was sufficient compliance with the order granting motion, and defendant excepted to such holding."

The defendant excepted to the action of the court in holding that the oath of the attorney, H. T. Smith, was sufficient, and in allowing said attorney to appear for the city of Mobile.

18 Defendant on March 18th, 1897, filed demurrers to the complaint in writing as follows, viz:

1. The defendant demurs to the complaint, and for cause of demurrer shows that — complaint shows on its face that the plaintiff is not in existence.

2. For further cause of demurrer defendant shows that the charter of the plaintiff was repealed February 6th, 1897, and that plaintiff is not in existence.

3. For further cause of demurrer defendant shows that the c
plaint shows no right in the plaintiff to sue for the recovery of
lands described therein.

The court on April 26, 1897, overruled each of said demurr
and grounds of demurrer, and the defendant excepted separately
the action of the court in overruling each of said demurrers
grounds of demurrer. On June 4, 1897, the defendant, after hav
filed his plea in this cause, moved the court for leave to withdr
its plea and filed demurrers to the complaint; whereupon the co
on the same day, made the following order, viz:

"This day came the parties, by their attorneys, and the defe
ant's motion to withdraw plea and file demurrers being argued
counsel and understood by the court, it is ordered and adjudged
the court that the defendant's said motion to withdraw plea and
demurrers be, and the same is hereby, granted; and it is furt
ordered by the court that the defendant be, and he is hereby, ta
with all the costs that have accrued up to this time, same to be p
in thirty days."

Whereupon the defendant, availing itself of said order, on
same day demurred in writing to the complaint as follows, viz:

"Comes the defendant and demurs to the plaintiff's compla
and as grounds of demurrer assigns each of the following:

1. Because the land- sued for are under the ebb and flow of
tide.

2. Because the complaint seeks the recovery of possession of
soil under the ebb and flow of the tide.

3. Because this suit is for soil under the navigable waters of t
State.

4. Also because the complaint seeks to recover possession of
navigable waters of this State in an action of ejectment.

The court overruled said demurrer and each ground thereof, a
the defendant excepted separately to the action of the co
19 in overruling said demurrer and each ground thereof.

And on the 5th day of May, 1897, being a day of the s
regular term of said court, the plaintiff filed the following motion
writing, viz:

"Now comes the plaintiff in the above-entitled cause and mo
the court to strike from the files the 2nd, 3rd, 4th, 5th, and 6th pl
by the defendant pleaded."

1. Because each of said pleas are frivolous.

2. Because none of said pleas contain the gist of a defense to s
action.

3. Because every defense which the defendant is entitled to set
in this case is available to it under the general issues set up in t
first plea by the defendant pleaded.

4. Because, having pleaded the general issue, the defendant is
entitled to plead specially.

The court, on May 10th, 1897, granted said motion and struck o
said pleas, and the defendant excepted to the action of the court
granting said motion of plaintiff and to the action in striking o
each plea separately.

And on the 5th day of June, 1897, being a day of the regular term of the court, at the trial of said cause, the plaintiff, to sustain his contention, said as follows, viz:

"I desire to introduce in evidence, although my understanding is that your honor takes judicial notice of those matters, the act of Congress approved March 2nd, 1819, entitled 'An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States,' and unless it is insisted upon by counsel on the other side I will not read it."

The defendant objected to the introduction of said act as evidence, and said as follows:

"This is the law, and it is the duty of the court to instruct the jury in the law; and this being the law, it cannot be introduced in evidence before the jury."

The court overruled defendant's objection, and defendant excepted to the action of the court in overruling defendant's said objection and in admitting said act in evidence before the jury.

The plaintiff said as follows, viz:

20 "I next desire to introduce in evidence the ordinances done in the convention at Huntsville on the 2nd of August, 1819, signed by J. W. Walker, president of the convention, and attested by John Campbell, secretary, to be found in the Code of Alabama of '76, page 68, together with the constitution there adopted, being the constitution adopted in 1819."

The defendant objected to the introduction of said act in evidence and said as follows, viz:

"I will make the same objections to that, and give more fully the reasons, because the act is one of which the court takes judicial notice, and is not to go before the jury in this case, and, if applicable to the jury at all, it must be given as a matter of law and not of evidence, and I want that objection noted to the first paper."

The court overruled the objection, and defendant excepted to the action of the court in overruling said objection and admitting said act as evidence before the jury.

The plaintiff then said as follows, viz:

"I now introduce the resolution of Congress of the United States approved December 14th, 1819, being the 'Resolution declaring the admission of the State of Alabama into the Union,' which is to be found in the Statutes at Large No. 3, p. 608 (Little & Brown's edition), simply accepting the constitution and proceedings, and there isn't any necessity of reading it in full."

The defendant objected to the introduction of said act as evidence before the jury for the reasons given, immaterial and irrelevant, and because the act is one of which the court takes judicial notice and is not to go in evidence before the jury for any purpose, and, if applicable to this case at all, it must be given to the jury as a matter of law and not of evidence.

The court overruled the objections, and defendant excepted to the action of the court in overruling the defendant's said objection and in admitting said act in evidence before the jury.

The plaintiff then said:

"We offer in evidence the act of the General Assembly of Alabama approved January 31st, 1867, entitled 'An act granting to the city of Mobile the riparian rights in the river front,' the same being found in Acts 1866 and '67, page 307. The act is very short and I will read it to the court;" and thereupon the plaintiff read as follows, viz:

21 "SECTION 1. Be it enacted by the senate and the house of representatives of the State of Alabama, in General Assembly convened, That the shore and soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined and set forth in section 2 of 'An act to incorporate the city of Mobile,' approved February 2nd, 1866, be and the same is hereby granted and delivered to the city of Mobile.

SECTION 2. Be it further enacted, That the mayor, aldermen and common council of the city of Mobile, be and are hereby created — declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

Approved January 31st, 1867."

The defendant objected to the introduction of the same as evidence before the jury upon the following grounds:

"1. Because the act is one of which the court takes judicial notice and is not evidenced for a jury for any purpose.

If applicable to this case at all — must be given to the jury as a matter of law and not of evidence.

2. Because it is immaterial and irrelevant.

3. Because the act is void as being *ultra vires*, because the State is a trustee of the shore and soil under the Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river and extends to the water line at low water.

Because accretions belong to the riparian owner.

5. Because whatever *the* rights the city of Mobile may have acquired under such act are now vested in the trustee for the bondholders of Mobile under the act to vacate and annul the charter of Mobile, approved February 11, 1879; p. 381 Pamph. Acts of Ala. 1878–'9.

6. Because the plaintiff is no longer in existence; because its existence was terminated by the act to provide a charter for the city of Mobile, approved February 6, 1897; p. 542 Pamph. Acts of Ala. 1896–'7.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitation of twenty years.

22 8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant. The suit is for

land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act."

The court overruled each of said objections separately, and the defendant excepted to the action of the court separately in overruling each objection and in admitting said act in evidence before the jury.

The plaintiff then said as follows:

"We now offer in evidence the act to incorporate the city of Mobile to be found in the Acts of '66, p. 202, being the act referred to in the act just offered, giving the limits of the city."

Defendant objected to the introduction of said act before the jury because it was immaterial and because the act is one of which the court takes judicial notice and is not evidence to go before the jury for any purpose, and if applicable to this case at all must be given as a matter of law and not of evidence.

The court overruled the objections, and defendant excepted to the action of the court in overruling each objection separately and in admitting said act in evidence before the jury.

The plaintiff then offered in evidence the act approved February 18, 1895, to be found in the Acts of the General Assembly of Alabama of 1894–5, p. 815, entitled "An act to fix the right of the city of Mobile to certain real estate."

The defendant objected to the introduction of said act in evidence before the jury upon the grounds stated in the last objection.

The court overruled the objection, and defendant excepted to the action of the court in overruling the defendant's objection and in admitting said act in evidence before the jury.

Plaintiff also offered the act found in the Acts of the General Assembly of Alabama of 1896–7, p. 50, entitled "An act to
23 amend an act entitled 'An act to fix the right of the city of Mobile in certain real estate,' approved February 18th, 1895," which is as follows, viz:

SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled "An act to fix the right of the city of Mobile to certain real estate," approved February 18th, 1895, be, and the same is hereby, amended so as to read as follows: Section 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining or incidental to any real estate, or any rights therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in

the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SECTION 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it may, if he thinks proper to do so convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters, approved December 5th, 1896.

Defendant objected because it is irrelevant and immaterial, and also because the act is one of which the court takes judicial notice and is not evidence to go before the jury for any purpose, and if applicable to this case at all must be given as matter of law and not of evidence.

The court overruled each of the defendant's objections, and the defendant excepted separately to the action of the court in overruling said objections and in admitting said act as evidence before the jury.

Thereupon the plaintiff rested.

The defendant, to support its contention, offered in evidence so much of volume three of the American State Papers " in relation to the public lands " as forms part of the " Register of claims to lands in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by
24 time or accident," and relates to the claim of Regis Bernoudy, numbered " 11," on page 30 of said printed volume.

The plaintiff objected to the introduction of said evidence as follows, viz: " Because there is no proof that the property in question is a Spanish grant, and does not purport to be such a grant, the paper offered being simply a statement by a commissioner that somebody made a claim to have a Spanish grant. * * * My objection being based upon the decision of the Supreme Court of the United States and the supreme court of the State of Alabama, to the effect that such grants date from the issuance of the patent of the United States * * * and not before, * * * the abstract furnished refers to only two places in this book, one being the report of the commissioner, * * * and (2) they believe that there was such a grant, although there was no proof of it. * * * and the question arises whether this is proof of the existence of a Spanish grant and (2) could the existence of an incomplete Spanish grant strengthen the title defendants rely upon."

The court sustained the plaintiff's objections and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's said objection and in excluding said evidence.

The defendant then offered in evidence so much of said volume

three of the American State papers "in relation to the public lands" as appears on pages 400, 401, and 402 of said volume, as report numbered "9," "Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

The plaintiff objected to the introduction of said evidence upon the grounds assigned in the last objection.

The court sustained the objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant thereupon offered both of said reports referred to above to show color of title.

The plaintiff objected to the introduction of said evidence for the same reasons assigned above, and the court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the plaintiff's objection and in excluding said evidence.

25 The defendant then offered in evidence the treaty of 1819 between the United States and Spain, as printed to the United States Statutes at Large, in the volume entitled "Revised Statutes of the United States relating to the District of Columbia, Post-roads and Public Treaties," 43rd Congress, 1873–1875, at pages 712 to 718, inclusive.

The plaintiff objected to the same because "it is irrelevant and immaterial to any issue in the cause."

The court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the plaintiff's objections and excluding said evidence.

The defendant then specially offered article VIII of said treaty on page 714 of said volume.

The plaintiff objected to the introduction of said evidence "upon the further ground that the treaty undertakes to confirm all complete grants, and there is no evidence of such a grant in this case."

The court sustained the objection, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant then offered in evidence the patent of the United States to George Poe and William H. Robertson, a true copy of which is as follows, viz:

"The United States of America to all to whom these presents shall come, Greeting:

Know ye that George Poe, Jr., William H. Robertson, and Philip McLosky, assignee of Regis Bernoudy, having deposited in the General Land Office a certificate numbered six of the register and receiver of the land office at St. Stephens, Alabama, whereby it appears that by the second section of the act of Congress, approved on the 3rd day of March, one thousand eight hundred and nineteen, entitled 'An act for adjusting the claims to land and establishing land offices in the districts east of the island of New

Orleans,' and of the second section of the act of Congress, approved on the 8th day of May, one thousand eight hundred and twenty-two, entitled 'An act supplementary to the several acts for adjusting the claims to land and establishing land offices in the districts east of the island of New Orleans,' the claim of Regis Bernoudy, in right Joseph S. Munora, entered as number eleven in abstract number ten of the reports of Commissioner Crawford, and as number two in report number nine of the register and receiver, was confirmed, and has been surveyed as section thirty-eight, in township four
26 south, of range one west, containing five hundred and seven acres and seventy-six-hundredths of an acre, in the district of lands subject to sale at St. Stephens, Alabama.

There is therefore granted by the United States unto the said George Poe, Jr., William H. Robertson, and Philip McLosky, as assignees of Regie Bernoudy, and to their heirs the tract of land above described. To have and to hold the said tract of land above described, with the appurtenances, unto the said George Poe, Junior, William H. Robertson, and Philip McLosky, as assignees of Regis Bernoudy, and to their heirs and assigns forever.

In testimony whereof I, Andrew Jackson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-eighth day of December, in the year of our Lord
[L. S.] one thousand eight hundred and thirty-six and the Independence of the United States the sixty-first.

By the President:

ANDREW JACKSON,
By A. JACKSON, JUNIOR, *Sec'y*,

HUDSON M. GARLAND,
Recorder of the General Land Office."

The defendant stated to the court that it offered it, first, to show title to the land in the defendant; and, secondly, to show that they are the riparian owners and as such entitled to all accretions; and, thirdly, to show that they are entitled to the use of land as the riparian owners. Defendant also stated that it expected to show that the land described in the patent goes down to the river.

The plaintiff objected to the introduction of the patent "because it was issued in 1836, and at that time the United States Government had no title in the land, the title having been vested in the State of Alabama in 1819, when it was admitted into the Union, and therefore it is irrelevant and immaterial."

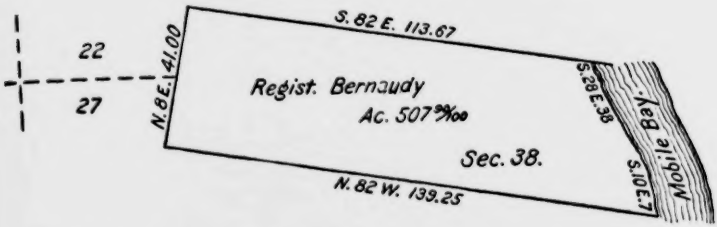
The court sustained the objection and excluded the evidence, and the plaintiff excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

The defendant then offered in evidence copy of the field-notes, of which the following is a true copy:

"Com'r rt. No. 10, cl. No. 11.

Sec. 38, township No. 4 south, range No. 1 west, St. Stephens land district, Alabama.

27



Pursuant to an order from the principal deputy surveyor of the land district east of the island of New Orleans and in conformity with a certificate No. — from the commissioners appointed under authority of the act of Congress of April 25th, 1812, and recognized by subsequent act approved March 3rd, 1819, I have surveyed a tract of land claimed by Regist Bernoudy on the Mobile river in the State of Alabama, being section No. 38, in township No. 4 of range No. 1 west of the basis meridian, and south of the 31st degree of latitude, and bounded as follows: Beginning at the southwest corner of this tract, being 7.55 — east of the N. W. corner of the Forbes tract, and designated by the following marks: A pine bears N. 45 E. 92 links and marked XIII; thence N. 8 E. 41.00 to a post on the south boundary line of the Favre tract, at the distance of 2.69 chs. east of the S. W. corner of the Favre tract, from which a pine bearing N. 45 E. 99 lnks and marked XIII; thence *to* S. 82 E. 113.67 to a post on the Mobile river; thence down the river with its meanderings S. 28 E. 38.00, S. 10 E. 7.00, S. 4 W. 4.00 to a post on the south boundary line; thence N. 82 W. 139.25 to the place of beginning, containing 507 acres and 76 hundredths of an acre and having such shape, form, and marks, natural and artificial, as are represented in the above plat and description the 22nd day of January, 1835.

(Signed) JOHN JAMES,
Deputy Surveyor.

Examined and approved 29th June, 1835.

JAS. H. WEAKLEY,
Surveyor U. S. Lands in Alabama."

A true copy of the original plat and notes on file in my office.

J. D. BARRON,
Secretary of State.

Montgomery, Alabama, April 27th, 1894.

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The plaintiff objected to the introduction upon the grounds as assigned to the patent, and the court sustained such objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and excluding said evidence.

28 Defendant then said it offered the field-notes not only to show the lines, but showing that they were riparian owners, owning down to the shores of the river. No ruling was made upon this remark.

The defendant then offered in evidence a transcript, certified under the certificate which form- Exhibit "A" to this bill of exceptions, of deed "A," which was a quitclaim deed dated May 25th, 1832, and duly recorded, from George Poe, Jr., and his wife and William H. Robertson and his wife to Philip McLosky, conveying the following property:

"All that certain tract, piece or parcel of land situate, lying and being in the county of Mobile aforesaid and forming and constituting a part and portion of a certain tract heretofore known and distinguished in said county of Mobile by the name of the Regis Bernoudy tract of land near Choctaw point, and described and butted and bounded as follows, viz., containing five arpens in front on the west side of the bay of Mobile, and extending from the said bay of Mobile westwardly in depth forty arpens; bounded on the east by the bay of Mobile, on the west by the western line of the said forty arpens or by the line at which the said forty arpens in depth shall or may terminate, on the north by certain lands this day conveyed by deed of quitclaim from the said William H. and Jane his wife and from the said Philip McLosky to the said George Poe, Jr., and on the south by lands this day conveyed by deed of quitclaim from George Poe, Jr., and his said wife Emma and by the said William McLosky to the said William H. Robertson in manner and form and according to the quality and dimensions as the said tract, piece or parcel of land is admeasured and laid down on the map or plan or survey thereof made and executed on the 30th day of April, 1832, by Andrew Henshaw, Esq., deputy surveyor of the United States which is to be recorded in the office of the clerk of the county court in and for the said county of Mobile and containing according to said map or plan all the quantity of land intended to be marked on said map by the division thereon marked in blue and which is computed and estimated at about one hundred and fifty-eight $\frac{15}{100}$ acres be the same more or less."

The plaintiff objected to the introduction of said evidence because it is immaterial and irrelevant, and the court sustained said objection and excluded said evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said evidence.

29 The plaintiff's attorney then addressed the defendant's attorney, who was then holding in — hands two bundles of papers, one consisting of certified copies of deeds and wills and the other consisting of original deeds, as hereinafter set forth, and there-

upon the following colloquy took place between the said attorneys and the court, viz:

Mr. SMITH: "I want to make this suggestion: I presume you want to offer each deed down to your defendant client, according to the abstract. Of course the question is the same; unless the grantor has title, the grantee cannot have. Let's agree that you have specifically offered each of the deeds that you have in your hand or in those two bundles, * * * according to the abstract, * * * and we will consider them as offered."

The COURT: "Treat them as offered and objected to and the objection sustained."

Mr. BROMBERG: "Objected to as irrelevant and immaterial"——

Mr. SMITH: "I don't see the object of giving the grounds of objection. Any ground of objection is good in the court sustains the objection. * * * To save any difficulty, I will admit that you could not find the originals of any one of the papers you have a copy of; that you made diligent search for the original paper and have been unable to find it, and that for that reason you offer the copy. In other words, I am perfectly willing to concede all the gentleman would make by going through it all."

Mr. BROMBERG: "That in all cases where the transcript of the deeds are offered that the original cannot be found, being either lost, mislaid, or destroyed, and cannot be found after diligent search?"

Mr. SMITH: "Yes, sir; this admission being made for the present trial."

And thereupon, in accord*ing* with the foregoing agreement—

The defendant then offered separately in evidence transcripts, certified under the certificate which forms Exhibit "A" to this bill of exceptions, of deeds B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, and V as follows, viz:

Deed "B."

Which was a quitclaim deed dated May 29th, 1832, and duly recorded, from Philip McLosky to James Magee and John Hagan, conveying the following property, viz: "The undivided two-thirds interest in the property described in deed 'A.'"

30

Deed "C."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Philip McLosky to Patrick McLosky, conveying the following property, viz: "The same property in deed 'A.'"

Deed "D."

Which was a quitclaim deed dated February 29th, 1833, and duly recorded, from Patrick McLosky to Philip McLosky, conveying the following property, viz: "The undivided one-fourth in the property described in deed 'A.'"

Deed "E."

Which was a quitclaim deed dated February 29th, 1833, and duly recorded, from Patrick McLosky to Thomas Barrett, conveying the following property, viz: "The undivided one-fourth interest in the property described — deed 'A.'"

Deed "F."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Patrick McLosky to James Magee, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "G."

Which was a quitclaim deed dated February 28th, 1833, and duly recorded, from Patrick McLosky to John Hagan, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "H."

Which was a warranty deed dated August 19th, 1834, and duly recorded, from Thomas Barrett to James Hopkins, conveying the following property, viz: "The undivided one-fourth interest in property described in deed 'A.'"

Deed "I."

Which was a warranty deed dated February 14th, 1835, and duly recorded, from James Hopkins and John Hagan to Philip McLosky and James Magee, conveying the following property, viz: "The undivided moiety or half part of that tract of land situate, lying and being in the county of Mobile and within the corporate limits of the city of Mobile containing one hundred and fifty-one acres more or less and having a front on the River Mobile of five arpents more or less by a depth from said river westwardly of about forty arpents. Bounded on the east by the River Mobile; on the north by lands of George Poe, Jr., on the south by lands of William H. Robertson and on the west by lands on the western extremity of said tract, the whole of the before described tract of land being prior to the execution of this indenture the joint property of the said parties of the first part and the second part to this indenture."

31 *Deed "J."*

Which was a warranty deed dated February 26th, 1835, and duly recorded, from Philip McLosky and James Magee to James G. Lyon and Joseph B. Earle, conveying the property, viz: "All that of two undivided third parts of that portion of land situate, lying and being within the city of Mobile and granted or confirmed by the United States to Regis Bernoudy, which is described and bounded as follows: That is to say, on the south by a line parallel with the

southern boundary line of the said grant or confirmation and distant therefrom thirteen chains eighty-five links; on the west by the western boundary line of the said grant or confirmation; on the north by a line parallel with the northern boundary line of the said grant or confirmation, and distant therefrom thirteen chains and eighty-five links; and on the east by the Mobile river, containing one hundred and fifty-one acres more or less and excluding the lands within the said boundary heretofore conveyed by us to Barnes."

Deed "K."

Which was a warranty deed dated February 27th, 1835, and duly recorded, from Philip McLosky and James Magee to Robert G. Gordon and Henry Goldthwaite, conveying the following property, viz: "The undivided one-third interest in land described in Deed 'J.'"

Deed "L."

Which was a warranty deed dated December 31st, 1835, and duly recorded, from Robert G. Gordon to S. H. Garrow, conveying the following property, viz: "The undivided one-sixth interest in the lands described in deed 'J.'"

Deed "M."

Which was a quitclaim deed dated March 3rd, 1836, and duly recorded, from Samuel H. Garrow, James G. Lyon, and Henry Goldthwaite to Joseph B. Earle, conveying the following property, viz: "That certain parcel of land situate, lying and being in the city of Mobile on the east side of Water street, having a front of seven hundred and fifty feet on the same—bounded as fol-
32 lows—on the west by Water street; on the east by channel of Mobile river; on the south by lands of William H. Robertson; and on the north by line parallel with south boundary line of lands belonging to George Poe, Jr., and others, and distant therefrom one hundred and fifty feet."

Deed "N."

Which was a warranty deed dated October 12th, 1836, and duly recorded, from Joseph B. Earle and wife to William Purvis and Robert Purvis, conveying the following property, viz: "That certain piece, parcel or lot of land lying and being in the city of Mobile on the east side of Water street having a front of six hundred feet on the same. Bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land of William H. Robertson; and on the north by line parallel with south boundary line of lands belonging to George Poe, Jr., and others and distant therefrom three hundred feet."

Deed "O."

Which was a deed of assignment made on the 5th day of December, 1837, and duly recorded, from William Purvis and Daniel Wheeler, merchants and copartners trading under the firm name and style of William Purvis & Co., to Edward Martineau, as trustee and assignee for the creditors of the said William Purvis and Daniel Wheeler, conveying property described as follows, viz: "Have and each of them hath granted, bargained, sold, aliened, enfeoffed, conveyed, confirmed, delivered, assigned, transferred and set over and by these presents do grant, bargain, sell, alien, enfeoff, convey, confirm, deliver, assign, transfer and set over to the said party of the second part, his heirs, executors, administrators or assigns all and singular, the lands, tenements, hereditaments, chattels, real, &c., &c., belonging to the said firm of William Purvis & Company, and all other the goods and chattels, moneys, stocks, debts, effects and estate, real and personal, &c., &c., which they or either of them may own, possess or be entitled to or have any interest in whatsoever and wheresoever," in trust "that the said Edward Martineau shall without unnecessary delay and in such manner made, and on such terms as he in his judgment may deem most for the interest of the parties of the third part (the creditors of W. P. & Co.), proceed to bargain, sell and convey, assign, transfer and dispose of all the property and effects whatsoever herein assigned and conveyed to him;" a part of the real estate conveyed to said Martineau *and*
33 is described in the schedule attached to said deed of assignment, as follows, viz: "an interest of two-thirds in a piece of real estate in Mobile, below the saw-mill fronting on Royal street 600 feet and extending to the channel of the river purchased of D. J. B. Earle at $40.00 per foot costs of one two-thirds."

Deed "P."

Which was a deed under the powers contained in deed "O," dated June 5th, 1842, and duly recorded, from Edward Martineau, trustee, to the Branch Bank of the State of Alabama, at Mobile, conveying the property as follows, viz: "The undivided one-half part of the following piece parcel or lot of land lying and being in the city of Mobile and State of Alabama on the east side of Water street, having a front of six hundred feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by lands now or late of William A. Robinson; on north by a line parallel with the south boundary line on land now or lately belonging to George Poe, Jr., and others and distant therefrom three hundred feet."

Deed "Q."

Which was a sheriff's deed under an execution against Robert Purvis, made November 2nd, 1840, and duly recorded, from William Magee, sheriff, to Daniel Wheeler, conveying the property as follows, viz: "All that certain piece or parcel of land situated in the

city of Mobile on the east side of Water street having on the east side of Water street — of six hundred feet bounded as follows, to wit: On the west by Water street; on the east by channel of Mobile river; on the south by lands of W. H. Robertson; and on the north by lands belonging to George Poe, Jr., and others."

Deed "R."

Which was a deed of assignment for the benefit of creditors, dated March 26th, 1858, and duly recorded, from Sidney Smith to Peter Hamilton and Duke W. Goodman, as assignees, conveying the following property, viz: All the real estate of the party of the first part (Sidney Smith) of every kind and description—in trust that the party of the second part (Peter Hamilton and Duke W. Goodman) shall sell and convert said property into money as speedily as they can, and in such manner as may seem to them best to comport with the interest of creditors of the party of the first part. Said real property is described in schedule annexed to said deed of assignment in part as "undivided half part of the lot situate on the east side of Water street, having a front thereon of six hundred
34 feet, more or less, bounded east by the channel of the river, being the middle division of the Bernoudy tract, J. Emanuel holding the other half."

Deed "S."

Which was a quitclaim deed dated June 1st, 1858, and duly recorded, from Peter Hamilton and Duke W. Goodman, made under the powers conferred upon them by deed "R," to Hugh Monroe, conveying the property, viz: "Undivided one-half part of lot of land situated on the east side of Water street, having a front thereon of six hundred feet, more or less, bounded east by the channel of Mobile river, being the middle division of the Bernoudy tract."

Deed "T."

Which was a quitclaim deed dated November 23rd, 1891, and duly recorded, from Mary E. Barnewall and William Barnewall to John Hogan and Kate Hogan, conveying the following-described property, viz: The south half of that certain piece, parcel or lot of land on the east side of Water street, having a front of six hundred (600) feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land now or late of William C. Robinson; on the north by a line parallel with the south boundary of land now or late belonging to George Poe and others and distant therefrom three hundred (300) feet, that is to say beginning on the east side of Water street where the south boundary line of the middle division of Bernoudy tract intersects the same; thence north on the said east line of Water street six hundred (600) feet to a point; thence eastwardly and parallel with the said south boundary line to the channel of Mobile river; thence southwardly along said channel to its intersection

with said south boundary line; thence westwardly along said so
boundary line to the beginning; said south half being more p
ticularly described as follows, to wit: Commencing at a point
the intersection of the southern and middle divisions of the B
noudy tract on the east side of Water street; thence running no
three hundred (300) feet to a point; thence running east to
channel of the Mobile river; thence running south along the chan
of said Mobile river to the intersection of the southern and mid
divisions of the Bernoudy tract; thence west to the place of beg
ning; bounded on the north by property of Mary E. Barnewa
east by the Mobile river; south by the southern division of
Bernoudy tract, and west by Water street.

35 *Deed "U."*

Which was a warranty deed dated March 19th, 1881, and du
recorded, from Hugh Monroe to John Hogan and Kate E. Hog
conveying property as follows, viz: "All and singular that piece
parcel of land situate and being in the city or port of Mobile, m
fully described as follows, to wit: Commencing at a point of the
tersection of the southern and middle division of the Bernou
tract on the east side of Water street thence running north th
hundred (300) feet to a point thence running east to the channe
the Mobile river thence running south along the channel of s
Mobile river to the intersection of the southern and middle divisi
of the Bernoudy tract thence west to the place of beginnin
bounded on the north by property owned by Mrs. Barnewall; e
by the Mobile river; south by the southern division of Bernou
tract and west by Water street."

Deed "V."

Which was a quitclaim deed dated April 29th, 1892, and du
recorded, from Mary E. Purvis, widow of Robert Purvis, to Jo
Hogan and Kate E. Hogan, conveying property described as follo
viz: "Beginning on the east side of Water street where the sou
boundary line of the middle division of the Bernoudy tract int
sects the same; thence running north along the east line of Wat
street three hundred (300) feet to a point; thence running eastwardl
and parallel with said south boundary line to the channel of t
Mobile river; thence southwardly along said channel to its inters
tion with said south boundary line; thence westwardly, along sa
south boundary line to the place of beginning; bounded south by t
southern division of the Bernoudy tract; west by Water stree
north by lot of Mrs. Barnewall, and east by the channel of the M
bile river."

The defendant also offered in evidence the following origin
deeds separately, viz:

Deed "22."

Which was the original deed, dated July 23rd, 1849, and duly recorded, of the Branch Bank of the State of Alabama at Mobile to Jonathan Emanuel and Sidney Smith of the following property, viz: "All the undivided one-half interest in the lot of land situate in the town of Mobile on the east side of Water street, and having a front thereon of six hundred feet be the same more or less; bounded east by the channel of Mobile river; south by lands
36 of William H. Robertson; north by a line parallel with the south boundary line of land now or late of George Poe, Jun'r, and others and distant therefrom three hundred feet the same being the property conveyed to this bank by deed from Edward Martineau, trustee of William Purvis, dated the 5th June, 1842, the deed conveying this trust dated 5th December, 1837."

Deed "26."

Which was a quitclaim deed dated March 23rd, 1881, and duly recorded, from H. Monroe to Marie E. Barnewall and William Barnewall of the property described as follows, viz: "All that certain piece, parcel or lot of ground, being lying and situated in the city, county and State aforesaid, more particularly described as follows: Being three hundred feet north of the undivided one-half part of lot of land situated on the east side of Water street, having a front thereon of six hundred feet more or less, bounded east by the channel of the Mobile river, being the middle division of the Bernoudy tract."

Deed "28."

Which was a quitclaim deed dated May 9th, 1892, and duly recorded, from William Barnewall to Mary E. Barnewall, his wife, the property described as follows, viz: "Beginning on the east side of Water (old) street three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street, thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly and parallel with the said south boundary line to the channel of Mobile river; thence southwardly along said channel to a point; thence westwardly, on a line parallel with the said south bound-ry line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by Water street; on north by property of the Sullivan Timber Company; on the east by the channel of Mobile river and on the south by property of John and Kate Hogan."

Deed "30."

Which was as follows: "Know all men by these presents, that we the undersigned heirs of the late Jonothan Emanuel for and in consideration of the love and affection we bear our kinswoman, Marie E. Barnewall, and for the further consideration of the sum of

ten dollars to us in hand paid, the receipt whereof is hereby acknowledged, do hereby release, remise, bargain, sell, quitclaim and convey unto the said Mary E. Barnewall all of our right,
37 title, claim or interest of every kind whatsoever, either at present, or in expectancy in and to the following-described property lying and being in the county of Mobile and State of Alabama, to wit:

That piece, parcel, or lot of land lying and being in the city of Mobile on the east side of Water street, having a front of three hundred feet on the same, bounded as follows: On the west by Water street; on the east by the channel of Mobile river; on the south by land now belonging to John Hogan; on the north by land now belonging to William Otis and others, known as the Bernoudy tract, middle division; also the one-half undivided interest in square three hundred and nineteen and three hundred and twenty Orange Grove in the said city and county.

To have and to hold unto the said Mary E. Barnewall and her heirs forever.

In testimony whereof we hereunto set our hands and seal this the 8th day of March, 1888.

JOSEPHENE E. MACARTNEY.	[L. S.]
VIRGINIA E. MITCHELL.	[L. S.]
EDWARD C. EMANUEL.	[L. S.]
H. W. SHIELDS.	[L. S.]
ISABEL SHIELDS.	[L. S.]
EVELYN MURRELL.	[L. S.]
MARY B. MURRELL.	[L. S.]
C. P. DEMING.	[L. S.]
D. G. RUTLAND.	[L. S.]
MINNIE DEMING.	[L. S.]
TEMPLE RUTLAND.	[L. S.]
LUCILE RUTLAND.	[L. S.]
H. RUTLAND.	[L. S.]
JOHN E. MITCHELL.	[L. S.]
EDWIN MACARTNEY.	[L. S.]
ARTHUR MACARTNEY.	[L. S.]
THOMAS E. MITCHELL.	[L. S.]
MARY B. MITCHELL.	[L. S.]

STATE OF ALABAMA, }
Mobile County. }

I, Z. M. P. Inge, a notary public in and for State and county aforesaid, hereby certify that John E. Mitchell, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 20th day of Jan'y, 1890.

Z. M. P. INGE,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Edwin Macartney, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 23rd day of Jan'y, 1890.

JNO. E. MITCHELL,
Notary Public, Mobile County, Alabama.

THE STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Arthur Macartney, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

38 Given under my hand this 11th day of March, A. D. 1890.

JNO. E. MITCHELL,
N. P., Mobile Co., Ala.

THE STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, do hereby certify that Thomas E. Mitchell, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 7th day of March, A. D. 1891.

JNO. E. MITCHELL,
N. P., Mobile County, Ala.

STATE OF ALABAMA, }
Mobile County. }

I, Jno. E. Mitchell, a notary public in and for said county, hereby certify that Mary B. Mitchell, whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, she executed the same voluntarily on the day the same bears date.

Given under my hand this 14th day of March, 1892.

JNO. E. MITCHELL,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Mobile County. }

I, W. H. Jones, a notary public in and for said State and county, hereby certify that Josephene E. Macartney, Virginia E. Mitchell, Edward C. Emanuel, H. W. Shields, Isabel Shields, Evelyn Murrell,

and Mary B. Murrell, whose names are signed to the foregoing conveyance and who — known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this 8th day of March, A. D. 1888.

W. H. JONES,
Notary Public, Mobile Co., Ala.

STATE OF ALABAMA, }
Conecuh County. }

I, J. R. Burt, clerk of the circuit court in and for said county and State, hereby certify that C. P. Deming, D. G. Rutland, Minnie Deming, and Tempie Rutland, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this tenth day of March, A. D. 1888.

J. R. BURT,
Clerk Circuit Court, Conecuh Co., Ala.

THE STATE OF MISSISSIPPI, }
County of Oktibbeha, } *ss:*

I, C. E. Gay, clerk of the chancery court in and for said county and State, do hereby certify that H. Rutland and Lucile Rutland, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the 20th day of March, A. D. 1888.

Given under my hand and seal of office this 20th day of March, A. D. 1888.

C. E. GAY, *Clerk.*"

Said deed was duly recorded March 15th, 1892.

Deed "31."

Which was a statutory warranty deed dated October 18th, 1892, and duly recorded, from Mary E. Barnewall and William Barnewall to Daniel E. Hugger, as trustee of the Mobile Transportation Company, conveying property as follows, viz: "That certain tract of land situated in the city of Mobile, State of Alabama, and more particularly described as follows, to wit: Beginning on the east side of old Water street three hundred (300) feet north of a point where
39 the south boundary line of the middle division of the Bernoudy tract intersects said street, thence running north on the east line of Water street three hundred (300) feet to a point, thence eastwardly and parallel with the said south boundary line to the channel of Mobile river, thence southwardly along said channel to a point, thence westwardly on a line parallel with the south boundary line and distant therefrom three hundred (300) feet to the

place of beginning; bounded on the west by old Water street, on the north by property of the Sullivan Timber Company, on the east by the channel of Mobile river and on the south by property of John and Kate Hogan, together with all and singular, the rights, tenements and appurtenances thereto belonging or in anywise appertaining."

Deed "32."

Which was a statutory warranty deed dated November 11th, 1892, and duly recorded, from John Hogan and Kate E. Hogan, conveying property described as follows, viz: "All and singular that certain piece, parcel or lot of land situate, lying and being in the city and county of Mobile, State of Alabama, and more particularly described as follows, viz: Beginning at a point on the east line of Water street where the dividing line between the middle and southern division of the Bernoudy tract intersects said street, thence running northwardly along the east line of Water street three hundred (300) feet; thence running eastwardly and parallel with said dividing line to the channel of Mobile river; thence running southwardly along the channel of said Mobile river to the intersection of said dividing line between the middle and southern divisions of the Bernoudy tract; thence westwardly along said dividing line to the place of beginning. Bounded on the north by lot of Mrs. Mary E. Barnewall; east by the Mobile river; south by the southern division of the Bernoudy tract; and west by Water street, together with all and singular the tenements, hereditaments, rights, members, privileges and appurtenances unto the above mentioned and described premises, belonging or in anywise appertaining."

Deed "35."

Which was a quitclaim deed dated April 29th, 1892, and duly recorded, from Mary E. Purvis to Mary E. Barnewall, conveying property described as follows, viz: "One-half ($\frac{1}{2}$) undivided interest in and to that certain tract of land in the city of Mobile, State of Alabama, to wit: Beginning on the east side of old Water street three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street; thence running northwardly on the east line of old Water street three hundred (300) feet to a point; thence eastwardly and parallel with the said south boundary line of the middle division of the Bernoudy tract to the channel of Mobile river; thence southwardly along said channel to the point where a line drawn parallel with the said south boundary line of the middle division of Bernoudy tract, and three hundred (300) feet north of said division line, would, if extended, meet said channel; thence westwardly on a line parallel with the said south boundary line, and distant therefrom three hundred (300) feet to the place of beginning. Bounded on the west by old Water street; on the north by property of Sullivan Timber Company; on the east by the channel of Mobile river; and on the south by property of John and Kate Hogan, being

an undivided one-half (½) interest in the north half of the same land conveyed by deed of J. B. Earle and his wife to my late husband, Robert Purvis, and his brother, William Purvis (which deed is recorded in Deed Book No. S, page 247, of the Mobile County records), and in which I became possessed of an undivided one-half (½) interest under the will of my said husband (said will being recorded in Will Book No. 4, page 110, of the Mobile County records), together with all the rights, tenements and appurtenances thereto belonging."

Deed "37."

Which was a quitclaim deed dated November 23rd, 1891, and duly recorded, from Mary M. Redwood and James F. Holcombe, conveying property described as follows, viz: "Whatever interest they may now possess in the north half of the above-described property to the said Mary E. Barnewall and William Barnewall, her husband, their heirs and assigns forever; that the said north half of said property being more particularly described as follows, to wit: Beginning on the east side of Water street three hundred (300) feet north of a point where the south boundary line of the middle division of Bernoudy tract intersects said street; thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly, and parallel with the said south boundary line to the channel of Mobile river; thence southwardly, along said channel to a point; thence westwardly, on a line parallel with the said south boundary line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by Water street; on the north by a line six hundred (600) feet north of the
41 said south boundary line of the middle division of Bernoudy tract and parallel therewith, on the east by the channel of Mobile river; and on the south by land of John and Kate Hogan."

Deed "38."

Which was a statutory deed dated April 15th, 1893, and duly recorded, from Daniel E. Huger, trustee of the Mobile Transportation Company, conveying property described as follows, viz: "That certain piece, parcel or lot of land situated in the county of Mobile, State of Alabama, more particularly described as follows: Beginning on the east side of old Water street, three hundred (300) feet north of a point where the south boundary line of the middle division of the Bernoudy tract intersects said street; thence running north on the east line of Water street three hundred (300) feet to a point; thence eastwardly and parallel with said south boundary line to the channel of Mobile river; thence southwardly, along said channel of Mobile river to a point; thence westwardly on a line parallel with the south boundary line and distant therefrom three hundred (300) feet to the place of beginning; bounded on the west by the old Water street; on the north by property of the Sullivan Timber Company; on the east by the channel of the Mobile river and on the south by property formerly of John and Kate Hogan.

Being the same property heretofore conveyed to the said Daniel E. Huger, trustee, by said Mary E. Barnewall and William Barnewall, her husband, which deed was recorded in the probate court of Mobile county in Deed Book # 70, N. S., page 64.

Second. That certain piece, parcel or lot of land, situate, lying and being in the county of Mobile, State of Alabama, and more particularly described as follows, to wit: Beginning at a point on the east line of Water street where the dividing line between the middle and southern division- of the Bernoudy tract intersects said street; thence running northwardly and parallel with said dividing line to the channel of Mobile river; thence running southwardly along the channel of said Mobile river to the intersection of said dividing line between the middle and southern division- of the Bernoudy tract; thence westwardly along said dividing line to the place of beginning. Bounded on the north by lot formerly of Mrs. Mary E. Barnewall; east by the Mobile river; south by the southern division of the Bernoudy tract and west by Water street; being the same property heretofore conveyed to the said Daniel E. Huger, trustee, by John Hogan and Kate E. Hogan, his wife, which
42 deed is recorded in the probate court of Mobile county, in Deed Book No. 70, N. S., page 86 to 88, together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances into the above-described premises appertaining or in anywise belonging."

The defendant then offered in evidence separately transcripts, *certificate* under certificate which is Exhibit "A" to this bill of exceptions, of the following wills, viz:

Last Will of Jonathan Emanuel.

Which was duly admitted to probate and record in February 27th, 1875, and which is as follows, viz:

"In the name of God amen, I Jonathan Emanuel of the city and county of Mobile, State of Alabama, being of sound and disposing mind and memory do make, publish, and declare this to be my last will and testament, hereby revoking and rendering null and void all other and former wills or codicils heretofore in any manner made by me.

First. I hereby nominate, constitute and appoint my beloved wife Isabella H. Emanuel to be my sole executrix of this my last will and testament, and it is my will and desire that my said executrix shall in no event be required by any court or power having authority over my estate to enter into bond or security for the faithful performance of her duties as such.

Second. I will and direct my said executrix to release and to discharge my brother Manly and my brother-in law Thomas S. King and my friend George S. Gaines from the payment of any money or monies which may be due or owing to me from them or either of them, and that no claim be made on either of them therefor.

Third. I hereby authorize, direct and empower my executrix as aforesaid to collect all monies which may be due or owing to me at the time of my death, and also (if necessary to pay any indebtedness I may be owing at the time of my death) to dispose of at public sale for cash first giving notice of any such sale all or so much of whatever, bank, insurance, railroad, hotel or other stock securities I may be possessed of *of* to produce an amount sufficient to pay off and fully to discharge every just and legal debt I may be owing at the time of my death.

Fourth. I hereby authorize and appoint my wife Isabella H. Emanuel, and my friend Daniel Wheeler, trustees, and to act as guardians of my children, and I desire that they shall not be
43 required whilst acting as guardian or trustee to give bond or security for the discharge of their respective duties as such

Fifth. I give, devise, and bequeath to my daughter Mary E Kennedy for her sole and separate use, benefit and behoof, and in nowise or manner ever to be subject to the control, management, or contracts of her husband should she hereafter marry, the following real estate in the city of Mobile, viz: My one-half undivided interest of two square- No. 319–320 in Orange Grove which I now own jointly with estate of Duke W. Goodman. Also one-half of six hundred feet in the Bernoudy tract now owned jointly with Hugh Monroe. I will and desire that my said daughter shall have and hold all of the above mentioned and described real estate for and during her natural life and at her death then the same to descend to any child or children or the issue of any such living at the time of her death, and on the event of my said daughter dying and leaving no child or children or their issue, then and in that event the same shall descend to the lawful heirs of my said daughter.

Sixth. I give, devise and bequeath to my daughter Evilene Murrell for her sole and separate use, the following mentioned and described real estate not to be in anywise or manner subject to the control, management, debts or contract of her husband, my one-half undivided interest with estate of Henry Center in the Buck stable and lot on W. St. Emanuel street between Dauphin and Conti streets now occupied by McReever. Also square 365 containing 11 lots in Orange Grove, also my one-half interest in 7 lots square 23 in Bernoudy tract, also my one-half undivided interest in Dauphin island. Also my one-tenth undivided interest in Pinto and Blakely islands, all in the city and county of Mobile and also my undivided one-half interest in 3,055 acres of land in Baldwin county owned with George S. Gaines and Price Williams, and I do hereby expressly will and direct that my said daughter shall hold and possess said mentioned real estate for and during the term of her natural life and at her death to descend to the child or children of my said daughter or the issue of such as may be living at the time of her death, and in the event of her leaving no child or children or the issue of any such then and in that event said mentioned real estate to descend to the lawful heirs of my said daughter.

Seventh. I give, devise and bequeath unto my daughter Fannie Rutland for her sole and separate use, benefit and behoof, and in

nowise or manner to be subject to the control, management
44 or contract of her husband should she hereafter marry, the following-described real estate in the city and county of Mobile: Three brick houses Nos. 258, 260, 262 on the north side of Dauphin between Cedar and Warren streets, now occupied by Mandeville and others. Also eight brick tenements, offices and lots N. Conti between Royal — St. Emanuel, now occupied by Hickey Lownes and others, Nos. 52, 54, 56, 58, 60 & 62, 64 Conti street; also my half undivided interest with est. T. Sanford in 4 lots 5, 6, 7, 8 in square 279 Orange Grove—also my half undivided interest with est. C. Gardner in Buck house W. St. Emanuel between Dauphin and Conti streets; also lots 3, 4, square 118 and lots 6, 7, 8, 9, 10, 11 square 174 Bernoudy tract, to have and to hold said mentioned real estate for and during the term of the natural life of my said daughter and at her death to descend to such child or children or the issue of such as may be the issue of my said daughter and living at the time of her death, and in event of her leaving no child or children or the issue of such, then the same shall descend to the lawful heirs of my said daughter.

Eighth. I give, devise, and bequeath to my daughter Josephine Macartney, for her sole and separate use, and in nowise or manner ever to be subject to the control, management, debts, contracts or liabilities of her husband, the following-described real estate in the city of Mobile, viz: Two brick stores No. 26, 28 St. Michael street, and the lot north of same between Royal and Water street and now occupied by Stonewall Insurance Co., Tardy & Co., and others. It is my will and desire that my said daughter Josephine shall hold said mentioned real estate for and during the term of her natural life and at her death to descend to any child or children of my said daughter and in the event of her leaving no child or children or the issue of such then to descend to the legal heirs of my said daughter.

Ninth. I give, devise and bequeath unto my daughter Virginia Mitchell for her sole and separate use and benefit, and in nowise or manner to be subject to the control, management, debts, contracts, or liabilities of her husband, the following-described real estate in the city of Mobile, viz: My one-half undivided interest with Charles Walsh in Marston's warehouse and wharf south of Theater and east of Water street to the channel of the river now occupied by Marston & Son; also my three-fourths undivided interest with E. S. Lyon in the two brick stores Nos. 36, 38, St. Michael street, and also of the two brick warehouses and vacant lot north of said stores and
45 situated between Royal and Water streets and now occupied by Taylor & Co., Peckaman & Co., W. H. Riley & Co. and others. It is my will and desire that my said daughter Virginia shall hold said mentioned real estate for and during the term of her natural life and at her death to descend to any child or children of my said daughter, and in the event of her leaving no child or children or the issue of such, then to descend to the legal heirs of my said daughter.

Tenth. I give, devise, and bequeath to my son Edward C. Emanuel for his sole use and benefit forever the following-mentioned real

estate, viz: Two brick houses and lots Nos. 24, 26, S. Royal street, between Conti — Dauphin streets now rented to I. Mandich and Peter Williams which said real estate shall be held in trust by my wife Isabelle H. Emanuel and my friend Daniel Wheeler to be held jointly in trust by them for the benefit of my said son until he shall attain the age of thirty years, at which time said property shall be delivered to him and he to hold a fee-simple title to the same, and it is my express will that until my said son attains the age of thirty years he shall have no authority to sell or dispose of said property, nor shall it be liable or subject to any lien or contract he may make after he attains that age.

Eleventh. I give, and bequeath to my brother Manly Emanuel for *her* sole use and benefit, the following-mentioned real estate in the city of Mobile, viz: My three-fourths undivided interest with F. S. Lyon he owning one-fourth interest in the brick store No. 18 N. Royal street now occupied by Tuscaloosa Art Association and also in the five brick stores and warehouses (East 48 Royal street) known as Nos. 44, 46, 48, 50 St. Michael and the stores N. E. corner Royal and St. Michael occupied by Gulf City Ins. Co. Knott & Blackwood and others, together with right and use of alley on St. Michael street.

Twelfth. I give, and bequeath unto my wife Isabella H. Emanuel, for her sole and separate use, forever, all the rest of my real estate whatever, and not herein disposed of, which legacy so given to my said wife is by me intended to be in lieu of and in full satisfaction of any and all dower interest which she may have in the real estate disposed of herein otherwise than to her if she accepts through the same as such.

Thirteenth. I further will and devise that all my debts owing by me at the time of my death shall be paid from the sale of my personal property, and that the remainder of my personal property consisting of money, stocks, bonds, indebtedness to me and of all
46 — any kind that may be belonging to me at my death, I hereby give and bequeath to my wife Isabella H. Emanuel, for her sole use and sole benefit, forever.

Fourteenth. It is my express will and meaning and I do hereby so order and appoint that on the event of any dispute or controversy or difference of opinion — arise with reference to any gift, bequest legacy, or any other matter or thing pertaining to this my last will and testament, no suit at law or in equity or otherwise shall be brought prosecuted, or defended for or concerning the same but that if any difference or controversy shall arise the same shall be referred to the award, order, and determination of my friend- Henry A. Schroeder and G. M. Parker, and what they shall award, order and determine therein shall be binding and conclusive on all and every person or persons therein concerned, provided that in the event of the said Schroeder and Parker arbitrators as aforesaid not being able to agree on such matters as may be submitted to them, then they shall select a third party whose decision shall be binding and conclusive. Provided further that should any one of the legatees herein named refuse to submit to any controversy which may

arise concerning any bequest herein named to the award of said Schroeder & Parker, or by any such umpire as they may select in the case of their disagreement, or to stand by and abide by and perform such award as the said arbitrators may make them and in such event the legacy or legacies hereinbefore given to such party or parties as refuse their assent as aforesaid are hereby declared null and void in the whole and every part thereof and the party or parties so refusing their assent shall in nowise be benefited by any of the provisions of this will, and I do hereby expressly direct that share or shares so forfeited be equally divided between such of the legatees under this my last will and testament as shall not dissent and shall abide by all decisions said arbitrators may make.

In witness whereof, I have hereunto set my hand and seal, this twenty-second June, one thousand eight hundred and seventy-two.

J. EMANUEL. [SEAL.]"

We, the undersigned, hereby state that Jonathan Emanuel signed the foregoing will in our presence on the day the same bears date, and that at the same time he acknowledged in our presence that the foregoing seven pages containing clauses from first to fourteenth, inclusive, was his last will and testament.

In witness whereof we, the undersigned, set our hands as
47 subscribing witnesses this 22nd day of June, 1872.

W. G. ENGLAND, SR.
THOS. J. BUTLER.
EDW'D E. ENGLAND.

"Last Will of Robert Purvis."

Which was duly admitted to probate and recorded July 24th, 1871, and is as follows, viz:

"In the name of God, amen, I Robert Purvis of the county and city of Mobile, State of Alabama, being of sound mind and memory do make, publish, and declare this my last will and testament.

I give and bequeath to my beloved wife Mary E. Purvis all my property of every character and description and I appoint my wife my sole executrix hereby revoking all former wills by me made, and it is my will that no bond or security be required of her for the execution of the trust.

In witness whereof I have hereunto set my hand and seal this fifth day of July, 1869.

ROBERT PURVIS."

Signed, sealed, published, and declared by Robert Purvis as his last will in presence of us, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses thereto.

L. M. WILSON.
WM. D. DUNN.
S. W. ALLEN.

"*Last Will of Hugh Monroe.*"

Which was duly admitted to probate and record May 29th, 1882, and which is as follows, viz:

"I, Hugh Monroe of the county of Mobile, State of Alabama being now old and infirm in body but of sound mind and memory, and desiring to dispose of my worldly goods and effects before my death, do make declare and publish this as my last will and testament, hereby revoking all wills or codicils by me heretofore at any time made.

Item 1. First of all I commend my soul to God who gave it me—my body I desire to be decently buried in the Magnolia cemetery by the side of my dear deceased wife.

Item 2. It is my will that as soon after my death as practicable my executor hereinafter named shall pay all my just debts
48 and funeral expenses and expenses attending my last sickness: The same to be paid out of any funds of my estate.

Item 3. I will and bequeath to my niece Mrs. Augusta Vail, wife of Daniel Vail, of New Brunswick, New Jersey, the sum of five thousand dollars—$5,000.00.

Item 4. I will and bequeath to my friend Mrs. Charles D. Deshler, wife of Charles D. Deshler, of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 5. I will and bequeath to my friend Jane T. Holcombe, of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 6. I will and bequeath to my friend Cosyman Holcombe of New Brunswick, New Jersey, the sum of two thousand dollars $2,000.00.

Item 7. I will and bequeath to my friend Mrs. Jane Dewes of New York, the sum of two thousand dollars, $2,000.00.

Item 8. I will and bequeath to my friend and namesake H. Monroe Dewes of New York the sum of two thousand dollars $2,000.00.

Item 9. I will and bequeath to my friend Charles K. Bill, of New York, the sum of two thousand dollars $2,000.00.

Item 10. I will and bequeath to my friend Mrs. Louise Redwood the sum of three thousand dollars $3,000.00.

Item 11. I will and bequeath to my friend and namesake H. Monroe McCearren the sum of one thousand dollars $1,000.00.

Item 12. It is my will and desire that in the event of my estate not being sufficient to pay all of the above special legacies in full then the same shall be paid *pro rata*.

Item 13. I nominate and constitute Cosyman Holcombe of New Brunswick and Mary Louise Redwood, of Mobile Alabama, executor and executrix of this my last will and testament, and it is my will and desire that they shall be permitted to qualify as such without giving any bond or security as such executor and executrix.

Item 14. I give, devise and bequeath to my said friends, Cosyman Holcombe, and Mary Louise Redwood in equal shares all the rest and residue of my state of every nature or kind whatsoever.

Signed, sealed and delivered as my last will and testament on this the 24th day of April, 1882.

H. MUNROE."

We, L. H. Faith and James M. Cloud, signed and witnessed the above will of H. Munroe at his request in his presence on this
49 24th of April, 1882.

L. H. FAITH,
JAMES M. CLOUD.

"*Last Will of Andrew C. Holcombe.*"

Which was duly admitted to probate and record in Middlesex county, New Jersey, February 15th, 1887, and which is as follows, viz:

"By divine permission, I Andrew C. Holcombe son of Theophilus M. Holcombe, late of the city of New Brunswick, deceased, do make publish and declare this as and for my last will and testament in manner following:

After payment of my just debts if any, I give bequeath and devise to my sister, Jane T. Holcombe her heirs and assigns all my estate real and personal whatsoever and wheresoever of which I may die seized, possessed of or in anywise entitled unto.

Secondly, I appoint my said sister Jane T. Holcombe the executrix of this my last will and testament and invest her with all needful authority and power to carry into full effect its provisions.

Witness whereof I hereunto set my hand and seal this 17th day of April, in the year of our Lord eighteen hundred and sixty-nine.

ANDREW C. HOLCOMBE. [L. S.]"

Signed, sealed, published, and declared by said Andrew C. Holcombe as and for his last will and testament in our presence, who, in his presence and in presence of each other, hereto at his request set our names as witnesses thereto this 17th day of April, 1869.

L. H. FERNALD.
JOSEPH FISHER, JR.

The plaintiff objected separately to the introduction of each of the said deeds, copies of deeds, and last wills offered in evidence by the defendant because it is immaterial and irrelevant, and the court sustained each objection of the plaintiff separately and excluded each deed, copy of deed, and will offered by the defendant separately, and the defendant excepted to the action of the court separately, in sustaining each objection of the plaintiff and in excluding each of said deeds, copies of deeds, and last wills.

The defendant then offered in evidence copy of the tax-lists of the city of Mobile from 1867 down to and including the year 1878 from the office of the trustee of the bondholders of the city of Mobile, which is annexed to this bill of exceptions as exhibit thereto and part thereof initialed "B."

50 The plaintiff objected to the same upon the grounds, vi
"that (1) if it was true that the city collected taxes fro
the defendant in this cause for any length of time, that would
immaterial under the decisions that estoppel is an equitable defen
and (2) the papers are not competent evidence; Z. M. P. Inge h
no authority to certify transcripts, and therefore it is not the be
evidence; (3) the transcripts don't purport to show what the ge
tleman states."

The defendant then said, "I will introduce the evidence of pa
ties who paid these taxes, that they paid these taxes on lands whic
were sold to the transportation company."

The court sustained the objection of the plaintiff and exclude
said evidence, and the defendant excepted to the action of the cou
in sustaining said objection and in excluding said evidence.

The defendant then offered in evidence copy of the tax-lists of th
port of Mobile and city of Mobile from 1879 down to 1897, inclu
sive, certified to by the tax collector of the city of Mobile, which
annexed to this bill of exceptions as exhibit thereto and pa
thereof initialed "C."

The plaintiff objected to the introduction of said evidence upo
the same grounds as the preceding objection, and the court sustaine
the plaintiff's objection, and the defendant excepted to the action o
the court in sustaining said objection and in excluding said ev
dence.

The defendant's attorney was then sworn, who testified on behal
of the defendant that he had made a personal examination of th
books, and that Exhibit "B" and "C" are copies of the books.

The plaintiff's attorney said, "I will admit that these are copie
of the books in each of these cases." "I will admit that you hav
copied them, or any one you want to say copied them, and tha
they are copied accurately, but I do not say they are relevant o
material."

The defendant offered in connection with the tax-lists the receipt
and tax bills against the defendant of the city of Mobile for th
years 1894, 1895, 1896, and 1897, which are annexed to this bill o
exceptions as exhibits thereto and part thereof initialed "D," "E,"
"F," "G" respectively.

The plaintiff objected to each of said bills separately upon the
grounds preceding assigned, and the court sustained each objection
separately and excluded said evidence, and the defendant excepted
separately to the action of the court in sustaining each ob
51 jection and in excluding said evidence.

The defendant's attorney said, "I propose to show by oral
evidence the assessments upon which these tax bills are based in its
descriptions cover the lands sued for in this complaint, and that
these taxes have been paid by the transportation company."

The defendant objected "to any testimony whatever in regard
to the payment of taxes to the city of Mobile as irrelevant and im-
material on the ground that it can only show an equitable estoppel
which is inadmissable in a court of law under the authorities cited;
(2) if any estoppel could be admitted in a court of law an estoppel

can only arise out of the representations made by the city, * * * and there is only one man authorized to assess property, * * * but what is on the books don't tend to show that the assessment is on this property; therefore it is incompetent, irrelevant, and immaterial."

The court sustained the plaintiff's objection and excluded said offer of evidence, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding offer of said evidence.

The court said, "I understand each one of those are offered separately; that is what your oral testimony was to cover."

The defendant then introduced the witness WILLIAM BARNEWALL, who testified that Mary E. Barnewall whilst living had been his wife; that she was one of Jonathan Emanuel's heirs and mentioned in his will, and that he is acquainted with the land sold by her to the Mobile Transportation Company; that it was the property bequeathed to her in said will and is shown on the map annexed to this bill of exceptions as a part thereof and exhibit thereto initialed "H," colored yellow and marked "Emanuel est.," next south of the lot marked "Sullivan Timber Co."

Defendant asked said witness: "Did you ever have charge and control of said lands?"

The plaintiff objected to the said question because irrelevant and immaterial, and (2) because it is not shown to be the land in suit.

The court sustained the plaintiff's objection and excluded said question, and the defendant excepted to the action of the court in sustaining plaintiff's objection and in excluding said question.

The defendant asked said witness, "Did you or not ever drive piling in front of this land which is marked 'Emanuel est.,' being the same sold to the transportation company by your wife?"

52 The plaintiff objected to said question because immaterial and irrelevant. The court sustained the plaintiff's objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said evidence.

The defendant asked said witness, "When was it you drove those pilings?"

The plaintiff objected to said question on the same grounds as preceding, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Said witness testified that Mr. Emanuel died in 1875.

The defendant asked said witness, "Did you or not pay taxes on the lands that were sold by your wife to the Mobile Transportation Company?"

The plaintiff objected to said question on the same grounds as preceding, and the court sustained said objection and excluded said questions, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the said witness to look at the copy of the

tax-list, Exhibit "B," and to state whether or not the land described in there as one-half six hundred feet part Bernoudy tract, for 1867 and subsequent years, was the land sold to the transportation company by witness' wife.

The plaintiff objected to said question as irrelevant and immaterial, and the court sustained said objection and excluded said question, and defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant then asked the witness whether or not the property assessed in Exhibit "C" to Mary E. Barnewall is the same property sold by her to the Mobile Transportation Company.

The plaintiff objected to said question as irrelevant and immaterial, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Upon cross-examination by the plaintiff the witness was asked, "Do you — that property out here" (reading description of land in complaint); to which the witness answered, "I cannot answer that question; all I know about it is three hundred feet north of
53 Hogan's wharf, extending to the line of the Sullivan Timber Company;" when the witness was interrupted by plaintiff saying, "The property I am speaking of is the property between Hogan's wharf and the Sullivan Timber Company;" to which witness answered, "I know that."

The defendant then said, "In order to save the time of the court we will offer the oral evidence of Mr. Barnewall, John Hogan, and others, tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right for twenty years before the bringing of this suit."

The plaintiff objected to that testimony, and the court sustained the objection and excluded said testimony, and the defendant excepted to the action of the court in sustaining said objection and in excluding said testimony.

The defendant introduced the witness D. M. N. Ross, who testified that he is the city engineer, and made the map attached to this bill of exceptions as exhibit thereto, initialed "H," and part thereof, and that the land described in the complaint is the land on said map marked at the four corners with the numbers 1, 2, 3, and 4, respectively. The defendant then offered said map in evidence.

The defendant then asked said witness to "Please examine the field-notes from the office of the secretary of state, at Montgomery, State of Alabama, as shown by the copy made April 27th, 1894, of section 38, township 4 south, range one west, St. Stephens land district of Alabama, and state whether or not the land which he had just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south, and north boundaries are concerned."

The plaintiff objected to said question because "the question being whether the property is within certain boundaries given in a

paper that has been excluded on the ground the grantor had no title."

The court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question. Defendant asked the witness, "What is there in front of this—within the north and south boundaries of this land which you have just described as being included in the complaint on the water front? Is it overflowed land or is it high and dry with shells on it—this portion right in here in front of Hogan's? Said witness replied, "In front of Hogan's
54 was filled with ballast;" that it was full except a portion left as a slip for vessels, which witness marked on the map—filled up with ballast in fron- and sawdust in behind; that the ballast and sawdust extends back nearly to the west line, as described in the complaint; that they had been filling in there off and on a number of years; that is all filled in with ballast, and has been filled in from year to year for the last ten years; that there is an ebb and flow of the tide right in there, but there has been no ebb and flow of tide where it has been filled in; that witness has been city engineer for about seventeen years.

The defendant asked the witness, "State is there such a thing known on the river front as a fixed high-water mark line on the land sued for."

The plaintiff objected to the question as irrelevant and immaterial, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness if he knew anything at all about the value of the improvements made down there. The witness answered, "I know the ballast was valuable there for filling in."

The plaintiff objected to the value of the ballast. The court sustained the objection and excluded the value of the ballast, and the defendant excepted to the action of the court in sustaining said objection and in excluding the value of the ballast.

The witness further testified that he did not know what the value would be, that it depended upon the value of the wharf.

The defendant then asked said witness whether there had been any filling done on the property marked on the map as "Emanuel estate."

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "How long ago did you first notice any filling upon the part marked 'Emanuel?'"

The plaintiff objected to the question as irrelevant and immaterial, and the court sustained the objection, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Whereabouts did Barnewall drive the piling in front of the Emanuel part"?

55 Plaintiff objected to the question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Are there or not wharves in front of this land described in the complaint?"

The plaintiff objected to the question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness, "Is there not the bed of a railroad track, is there not the grading of a railroad track upon this land described in the complaint?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness, "Is it marked by a pencil line with the word railroad on the map? How long ago was that grading for a railroad track built?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

Upon cross-examination by the plaintiff the witness testified that two or three hundred dollars a year would be a fair rental value for the land described in the complaint.

The defendant introduced the witness JOHN HOGAN and asked him, "Look at this map and state whether or not—here is the Sullivan Timber Company, and Mr. Ross testified that this was the land described in the complaint; now, did you ever make any improvements upon that land?" exhibiting to witness the map which is attached as exhibit to this bill of exceptions. The witness answered, "Yes; this is the piece here; this is the Emanuel piece."

The defendant asked said witness, "Did you ever make any improvements on that marked 'John Hogan'?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded
56 said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness if he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map.

The plaintiff objected to the question as immaterial and irrelevant, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The witness testified that the lands shown on said map are in the city of Mobile.

The defendant asked the witness, "What is the value of the improvements made by you upon the portion of the lands lying east of the line marked number one and number four on the map?"

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked said witness whether or not the improvements made by him on the portion of the land lying east of the line between the points No. 1 and No. 4 were made by him more than three years before the bringing of this suit.

The plaintiff objected to said question as immaterial and irrelevant, and the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and in excluding said question.

The defendant asked the witness whether or not there were any improvements upon the lands marked on the map as "Emanuel."

The plaintiff objected to the question as immaterial and irrelevant, the court sustained the objection and excluded the question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The defendant asked said witness how long ago said improvements were made.

The plaintiff objected to said question on the preceding grounds, and the court sustained said objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

57 The defendant asked said witness about what is the value of said improvements.

The plaintiff objected to said question on the preceding grounds, and the court sustained the objection and excluded said question, and the defendant excepted to the action of the court in sustaining said objection and excluding said question.

The defendant then offered again to introduce the papers, the Exhibits "B," "C," "D," "E," "F," and "G" separately, because the estoppel not permitted in actions of ejectment is by parol acts, and assessments of property are matters of record.

The plaintiff objected to each of said papers separately upon the same ground as before, and the court sustained the objection to each of said papers separately and excluded them, and the defendant excepted to the action of the court in sustaining said several objections separately and in excluding said evidence.

The defendant then offered in evidence again, seriatim, the evidence heretofore offered by it from volume 3, American State Papers; the field-notes of section 38; the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probate of wills, and original deeds before offered in evidence and excluded seriatim for the purpose of showing color of title in the defendant to the lands described in the complaint.

The plaintiff objected to each of the papers so offered upon the same grounds before given.

The court sustained the objection and excluded the evidence, and the defendant excepted to the action of the court in sustaining the objection and in excluding said evidence.

Thereupon both parties rested.

This was substantially all the evidence. The plaintiff introduced no witnesses whatever.

At the plaintiff's request the court charged the jury as follows, viz:

"The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff."

The defendant excepted to the action of the court in granting said request and in giving the said charge requested by the plaintiff.

The defendant requested *to* the court to give the charge in writing as follows, viz:

58 "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31st, 1867, was not under the waters of the Mobile river."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the action of the court in refusing the defendant's request and in refusing to give said charge in writing.

The defendant requested the court to give the charge in writing as follows, viz:

"If the jury believe the evidence in this case, they must find for the defendant."

The court refused to give said charge, and wrote across it, "Refused, W. S. Anderson, judge;" and the defendant excepted to the

action of the court in refusing the defendant's request and in refusing to give said charge in writing.

And on the 7th day of June, 1897, being a day of said regular term, the defendant made the motion in writing to retax costs, as shown in said motion annexed to this bill of complaint as
59 exhibit thereto and part thereof initialed "I." Said motion came on to be heard on the 15th day of June, 1897, being a day of the said regular term of said court, and at the hearing thereof the defendant in support of the motion introduced the clerk of the court as a witness, who testified that all of the witnesses named in the defendant's said motion had been summoned at the instance of the plaintiff; that the bill of costs annexed to this bill of exceptions as exhibit thereto, initialed "K" and part thereof, is the bill of costs rendered by him in this cause for costs up to June 4th, 1897.

The plaintiff, in opposition to said motion, introduced the affidavits of Harry T. Smith and Richard W. Stoutz, which are annexed to this bill of exceptions as part thereof, and exhibit thereto initialed respectively "L" and "M."

The court, having considered said evidence, refused defendant's motion and refused to retax said costs, and the defendant excepted to the action of the court in refusing said motion and in refusing to retax said costs.

And on the 7th day of June, 1897, being a day of said regular term of said court, the defendant made the motion in writing, which is annexed to this bill of exceptions as exhibit thereto, initialed "N" and part thereof, to set aside the verdict and judgment before rendered in this cause and to grant defendant a new trial, for the reasons set forth in said writing. Said motion came on to be heard and upon the 15th day of June, 1897, being a day of the said regular term of said court, the court made an order refusing to set aside the verdict and judgment before rendered in this cause, and the defendant excepted to the action of the court in refusing said motion and in refusing to set aside said verdict and judgment and in refusing to grant defendant a new trial.

And thereupon the defendant tenders this its bill of exceptions, which is accordingly signed on this the 21st day of July, A. D. 1897, being a day within the sixty days after the expiration of the term allowed by the court within which to tender this bill of exceptions.

WM. S. ANDERSON,
Judge 13th Judicial Circuit.

Filed in office July 31st, 1897.

B. F. JACKSON, *Clerk.*

60 EXHIBIT "A."

STATE OF ALABAMA, }
Mobile County. }

I, Price Williams, Jr., judge of the probate court in and for said county and State, do hereby certify that the foregoing one hundred and fifty pages of writing are full, true, and correct copies of deeds,

mortgages, and wills made as follows, to wit: George Poe, Jr., *et al.* to Philip McLosky, Deed Book K, pp. 307 & 308; Phillip McLosky to James McGee, Deed Book K, pp. 303 & 304; Phillip McLosky to Patrick McLosky, Deed Book K, pp. 498 & 499; Patrick McLosky to Philip McLosky, Deed Book K, pp. 512 and 513; Patrick McLosky to Thomas Barrett, Deed Book K, pp. 523 & 524; Patrick McLosky to James Magee, Deed Book K, pp. 541 & 542; Patrick McLosky to John Hagan, Deed Book K, p. 551; Thos. Barrett to James Hopkins, Deed Book N, pages 4 & 5; Jas. Hopkins and John Hagan to Philip McLosky and James Magee, Deed Book N, pp. 283 & 284; Philip McLosky and James Magee to Jas. G. Lyon and Jos. B. Earle, Deed Book N, pp. 290 and 291; Philip McLosky and Jas. Magee to Robert G. Gordon and Henry Goldthwaite, Deed Book Q, p. 404; Robert G. Gordon to Samuel H. Garrow, Deed Book P, p. 371; Samuel H. Garrow, James G. Lyon, and Henry Goldthwaite to Joseph B. Earle, Deed Book S, pp. 93 and 94; James B. Earle to Wm. Purvis and Robert Purvis, Deed Book S, pp. 247 & 248; Wm. Purvis & Co. to Edward Martineau, trustee, Mortgage Book U, pp. 541 to 552, both inclusive; Edward Martineau to branch of the Bank of the State of Alabama, Deed Book No. 5, O. S., pp. 129 and 130; Wm. Magee, sheriff of Mobile Co., to Daniel Wheeler, Deed Book No. 2, O. S., pp. 94 and 95; Sidney Smith and wife to Peter Hamilton and Duke W. Goodman *et al.*, Mortgage Book No. 5, N. S., pp. 402 to 407, inclusive; Peter Hamilton and Duke W. Goodman to Hugh Monroe, Deed Book No. 12, pp. 376 and 377; Mary E. Barnewall and husband to John Hogan and Kate E. Hogan, Deed Book 68, pp. 64 & 65; Hugh Monroe to John Hogan and wife, Deed Book No. 47, pp. 600 & 601; Mary E. Purvis to John Hogan and wife, Deed Book No. 69, p. 208; also the last wills and testaments of Jonathan Emanuel, Will Book No. 4, p. 429 to 436, inclusive; Robert Purvis, Will Book No. 4, pp. 110 to 112; Hugh Monroe, Will Book No. 5, pp. 397 to 400; A. C. Holcombe, Will Book 7, p. 129 to 133, inclusive, with the proofs thereof as the same appear of record and on file in my office.

Testimony whereof I hereto set my hand and seal of said court, at office, this the 2nd day of June, A. D. 1897.

61 [SEAL.] PRICE WILLIAMS, JR., *Judge.*

Attest: H. O. HAYNIE, *Clerk.*

In the Circuit Court of Mobile, Ala.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597. Agreement.

It is agreed between the parties to this suit, by their attorneys, for the purpose of simplifying the bill of exceptions and reducing the expense thereof, that the deeds and copies of deeds and copies of wills and probate thereof offered in evidence by the appellant and excluded by the court, need not be set out *in extenso* in said bill of exceptions; but that said deeds and copies of deeds shall be considered sufficiently set forth when the dates thereof and names of

grantors and grantees therein are given with the description in said deed; said deeds or copies may be numbered or initialed consecutively and when the descriptions in two or more of said deeds are alike only one of said descriptions need be set forth *in extenso* and the others shall be considered sufficiently set forth by making reference by initial or number to the deed wherein said description is set out *in extenso* in said bill of exceptions; and that said deeds and copies of deeds are free from legal objections except when and for the cause particularly mentioned in the bill of exceptions. Said wills and the probate thereof shall be considered sufficiently set forth when the date, name or testator and date of probate is given together with the effect of said wills, the effect thereof to be expressed in language mutually agreeable to the parties hereto and the effect stated in the bill of exceptions when said bill is signed by the presiding judge shall be sufficient evidence of said agreement; or in default of said agreement the wills themselves without the probates thereof shall be set forth *in extenso* and that said wills and probates thereof are free from legal objections except when, and for the causes, particularly mentioned in said bill of exceptions. It is further agreed that the certificate by Price Williams, judge of the probate for Mobile county dated June 2nd, 1897, is the only certification to said transcripts of said deeds, wills, probates, and the records thereof, and that said certificate shall be set out once *in extenso* in said bill of exceptions or as an exhibit thereto.

62 It is further agreed that the map offered in evidence by the appellant, and which was admitted by the court, may be omitted from the bill of exceptions tendered the judge and that a tracing thereof may be embodied by the clerk in the transcript for the Supreme Court in its appropriate place in the copy of the bill of exceptions.

It is further agreed that the reports contained in volume 3 of the American State Papers respecting the Regis Bernondy claim offered in evidence by the appellant and excluded by the court, need not be set out *in extenso* in the bill of exceptions tendered to the judge, but may be considered in said bill of exceptions concisely, and that the printed volume may be used on the appeal by the Supreme Court as if set out in full in the bill of exceptions and be considered by the judge of the circuit court as if set out in full in the bill of exceptions.

It is further agreed that the acts introduced in evidence by the appellee, except the act entitled "An act granting to the city of Mobile the riparian rights in the river front" approved Jan'y 31st, 1867, as printed in Pamphlet Acts 1866–'67, page 307, and the act entitled "An act to amend an act entitled An act to fix the right of the city of Mobile to certain real estate, approved February 18th, 1895," approved December 5th, 1896, as printed in Acts 1896–'97, page 49, which two excepted acts shall be set out *in extenso*, need not be set out at length in the bill of exceptions, but may be set out as follows, viz:

1st. The act entitled "An act to enable the people of Alabama Territory to form a State constitution and State government, and for the admission of such State into the Union on equal footing with the

original States." Approved, March 2nd, 1819, as printed in the Code of Alabama, 1876, at pages 40–42.

2nd. The constitution of the State of Alabama 1819 as printed in the Code of Alabama, 1876, at pages 53 *et seq.*

3rd. The ordinance of the constitution adopted August 2nd, 1819, as printed in the Code of Alabama, 1876, at pages 68 and 69.

4th. The resolution of Congress U. S. A. of December 14th, 1819, as printed in 3rd, United States Statutes at Large, at page 608, admitting Alabama into the Union.

5th. The act entitled "An act to fix the right of the city of Mobile to certain real estate," approved February 18th, 1895, as printed in the Pamphlet Acts of Alabama, at page 815.

63 And it is agreed that the copies of said acts, resolutions or ordinances in the printed volumes respectively containing said acts, resolutions and ordinances referred to, may be referred to as if incorporated in this bill of exceptions, both by the judge of the circuit court and by the Supreme Court, and the said printed volumes may be used by the appellant and be referred to by the Supreme Court on the appeal in this cause.

This agreement may be embodied in the bill of exceptions as a part thereof.

FRED'K G. BROMBERG,
Attorney for the Appellant.
GREGORY L. & H. T. SMITH,
Att'ys for Appellee.

EXHIBIT "B."

Tax lists, city of Mobile, 1867.

	Description.	Value	Page.
Paid—Emanuel, J.....	½ 600 ft. Bernoudy tract	$600	2
Paid—Munroe, Hugh.....	300 ft. front near Delaware street, mid. div., B. T.	1,000	4

Tax list-, city of Mobile, 1868.

Paid—Emanuel, Jonathan....	½ 600 ft Bernoudy tract, front.....	600	2
Paid—Munroe, Hugh	300 ft. near Delaware street, mid. div., B. T	800	16

Tax lists, city of Mobile, 1869.

Paid—Emanuel, Jonathan....	½ 600 ft. Bernoudy tract...	600	6
Paid—Munroe, Hugh	300 ft. near Delaware St., mid. div., B. T.....	800	11

Tax lists, city of Mobile, 1870.

Paid—Emanuel, Jonathan....	½ 600 ft. Bernoudy tract.....	600	5
Paid—Munroe, Hugh	300 ft. near Delaware St., middle div., B. T.....	800	11

Tax lists, city of Mobile, 1871.

Paid—Emanuel, Jonathan ...	½ 600 ft. in the Bernoudy tract. ...	600	6
Paid—Munroe, Hugh	300 ft. near Delaware St., Bernoudy tract	800	14

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Tax lists, city of Mobile, 1872.

	Description.	Value.	Page.
Paid—Emanuel, Jonathan	½ 600 ft. in the Bernoudy tract	600	2
Paid—Munroe, Hugh	300 ft. near Delaware St., Bernoudy tract	800	14

Tax lists, city of Mobile, 1873.

Paid—Emanuel, Jonathan	½ 600 ft. Bernoudy tract	600	5
Paid—Munroe, Hugh	300 ft. near Delaware St., Bernoudy tract	800	18

Tax lists, city of Mobile, 1874.

Paid—Emanuel, Jonathan	½ 600 ft. Bernoudy tract	600	1
Paid—Munroe, Hugh	300 ft. near Delaware St., Bernoudy tract	600	10

Tax lists, city of Mobile, 1875.

Paid—Emanuel, Jonathan	½ 600 ft. Bernoudy tract	600	5
Paid—Munroe, Hugh	300 ft. Bernoudy tract near Delaware St.	600	11

Tax lists, city of Mobile, 1876.

Paid—Barnewall, Mary S.	½ int. with Hugh Munroe in strip of land 600 ft. in width, Bernoudy tract	600	5
Munroe, Hugh			18

Tax lists, city of Mobile, 1877.

Paid—Barnewall, Mary E.	1/10 int. with Hugh Munroe in a slip of land 600 ft. in width	250	5
Paid—Munroe, Hugh	½ int. in strip of land 600 ft. wide lying immediately N. of S. line of mid. div., B. T., extending from Old Water street to ch. of river	1,500	20

Tax lists, city of Mobile, 1878.

Paid—Barnewall, Mary E.	½ int. with Hugh Munroe in a strip of land 600 ft. in width lying immediately N. of S. line of mid. div., Bernoudy tract, extending from Old Water street to ch. of river	250	6

Tax lists, city of Mobile, 1878—Con.

65	Paid—Munroe, Hugh	½ int. in a strip of land 600 ft. wide lying immediately N. of S. line, mid. div., Bernoudy tract, extending from Old Water street to channel of river	500	21

Office of the trustee of the bondholders of the city of Mobile, Alabama.

I, Z. M. P. Inge, trustee of the bondholders of the city of Mobile, Alabama, hereby certify that the foregoing pages, numbered from 1 to 3, inclusive, are true copies of entries on tax lists of the city of Mobile, Alabama, now on file in my office.

Witness my hand this first day of June, A. D. 1897.

Z. M. P. INGE,
Trustee Bondholders of the City of Mobile, Alabama.

EXHIBIT "C."

Tax lists, port of Mobile, 1879.

	Description.	Value.	Page.
Paid—Barnewall, Mary E....	½ int. with Hugh Munroe in a strip of land 600 ft. wide lying immediately N. of S. line, mid div., B. T., extending from Old Water street to ch. river		
Paid—Munroe, Hugh	½ int. in strip of land 600 ft. wide, lying immediately N. of S. line B. T., extending from Old Water street to ch. river	$250	5
		500	17

Tax lists, port of Mobile, 1880.

Paid—Barnewall, Mary E....	½ int. with Hugh Munroe in a strip of land 600 ft. wide lying immediately N. of S. line, mid. div., B. T., extending from Old Water street to ch. of river		
Paid—Munroe, Hugh	½ int. in the strip of land 600 ft. wide lying immediately N. of S. line, B. T., and extending from Old Water street to channel of river	200	5
		500	17

Tax lists, port of Mobile, 1881.

Paid—Barnewall, Mary E....	½ int., strip of land 600 ft. wide, N. of S. line, mid. div., Bernoudy tract	200	4
Paid—Munroe, Hugh	300 ft., mid. div., B. T., on river...	500	18

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Tax lists, port of Mobile, 1882.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line of Bernoudy tract	250	4
Paid—Monroe, Hugh	300 ft. on river front	500	16

Tax lists, port of Mobile, 1883.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, M. D., B. T.....	500	4

Tax lists, port of Mobile, 1884.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, middle div., Bernoudy tract.....	500	5
Paid—Hogan, John.....	Wharf and river front S. of dry dock, marine ways, machinery, &c., adjoining above.....	2,000	13

Tax lists, port of Mobile, 1885.

Paid—Barnewall, Mary E....	½ int. in 600 ft. north of S. line, middle division, of Bernoudy tract	1,500	4
Paid—Hogan, John.....	Wharf and river front S. of dry dock, marine ways, machinery, &c., adjoining above.	3,500	12

Tax lists, port of Mobile, 1886.

Paid—Barnewall, Mary E....	½ int. in 600 ft. N. of S. line, M. —, B. T.....	1,000	4
Paid—Hogan, John	Wharf and L. river front S. of Elmira St., marine ways & machinery adjoining above..... .	3,500	13

Tax lists, city of Mobile, 1887.

	Description.	Value.	Page.
Paid—Barnewall, Mary E....	½ int. in 600 ft. N. side line, mid. div., Bernoudy tract	500	4
Paid—Hogan, John.....	Lot and wharf, river front south of dry dock	1,000	13

Tax lists, city of Mobile, 188[illegible].

Paid—Barnewall, Mary E ...	½ of 600 ft. foot of New Jersey street.	2,500	4
Paid—Hogan, John	Lot and wharf on river front *1* S. of dry dock	7,000	15

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Tax lists, city of Mobile, 1889.

Paid—Barnewall, Mary E ...	300 ft. N. S. line, mid. div., B. T...	2,500	4
Paid—Hogan, John.....	Lot and river front S. of dry dock..	7,000	14

Tax list-, city of Mobile, 1890.

Paid—Barnewall, Mary E ...	300 ft. N., mid. div., B. T.....	2,500	4
Paid—Hogan, John	Va. land and wharf on river front opp. dry dock	10,000	14

Tax lists, city of Mobile, 1891.

Paid—Barnewall, Mary E ...	300 ft., M. D, B. Tr., Wm. Barnewall, agent	2,500	5
Paid—Hogan, John.....	Va. land and wharf on river front S. of dry dock	8,000	15

Tax lists, city of Mobile, 1892.

Paid—Barnewall, Mary E ...	300 ft., M. D., B. Tr.....	3,000	6
Paid—Hogan, John.....	Lot and wharf on river front S. of dry dock	5,000	15

Tax lists, city of Mobile, 1893.

Paid—Barnewall, Mary E....	300 ft., M. D., B. Tr.....	3,000	5
Paid—Hogan, John	Lot and wharf, river front S. of dry dock	5,000	15

Tax lists, city of Mobile, 1894.

Paid—Mobile Transportation Company.....	300 ft, M. D., B. tract, being E. Water 300 ft. to a point where the south line intersects said street...	7,500	15
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	

Tax lists, city of Mobile, 1895.

Paid—Mobile Transportation Company.....	300 ft., M. D., B. Tr., being E. Water 300 ft. N. to a point where the S. line, mid. div., Ber. tract, intersects said street	7,500	15
68	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	

Tax lists, city of Mobile, 1896.

	Description.	Value.	Page
Paid—Mobile Transportation Company	300 ft., M. D., B. Tr., being E. Water 300 ft. N. to a point where the S. line, mid. div., B. T., intersects said street.....	7,500	17
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water St., S. by Geo. C. Forbes...	7,500	

Tax lists, city of Mobile, 1897.

Mobile Transportation Company..... ...	300 ft., M. D., B. T., being E. Water 300 feet N. to a point where the S. line, mid. div., B. T., intersects said street	7,500	17
	Land and wharf front, bounded N. by Barnewall, E. by river, W. by Water street, S. by Geo. C. Forbes	7,500	17

Office of the tax collector of the city of Mobile.

I, Frank Petronivich, tax collector of the city of Mobile, Alabama, hereby certify that the foregoing pages, numbered from 1 to 5, inclusive, are true copies of entries of the tax lists on file in my office.

Witness my hand this 1st day of Jan'y, A. D. 1897.

FRANK PETRINOVICH,
Tax Collector of the City of Mobile, Alabama.

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EXHIBIT "D."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1894.

Value of real estate.....	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, jewelry, plate, pianos, guns, &c.		
Goods and merchandise.....		
Capital employed, money loaned, &c.....		
Money invested in stocks, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	15,000 at $\frac{6}{10}$ per cent....	90.00

Rebate	
Penalties	90
Costs	
Collector's fee	50
	$91.40

Received payment.
Mobile, June 4, 1895.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1894, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1894.

[Written across the face:] Duplicate.

70 EXHIBIT "E."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1895.

Value of real estate	$15,000		
Live stock and vehicles of any description			
Machinery and tools of any description			
Furniture of any description—libraries, jewelry, plate, pianos, guns, &c.			
Goods and merchandise			
Capital employed, money loaned, &c.			
Money invested in stocks, bonds, water craft, &c.			
Dividends, commissions, premiums, &c.			
Say tax on	$15,000	at $\frac{6}{10}$ per cent.	90 00
Collector's fee			
Rebate			2 70
Penalties			
Costs			
			87 30

Received payment.
Mobile, Apr. 30, 1895.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1895, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1895.

[Written across the face:] Duplicate.

71 EXHIBIT "F."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1896.

Value of real estate	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, jewelry, plate, pianos, guns, &c.		
Goods and merchandise,		
Capital employed, money loaned, &c.		
Money invested in stocks, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	$15,000 at $\frac{6}{10}$ per cent.	90
Collector's fees		
Rebate, 3		2
Penalties		
Costs		
		887

Received payment.
Mobile, April 30, 1896.

FRANK PETRINOVICH,
Tax Collector.

The city taxes assessed against you for the year 1896, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1896.

[Written across the face:] Duplicate.

FOLD OUT IS TOO LARGE TO BE FILMED

72 EXHIBIT "G."

Frank Petrinovich, tax collector.

Mobile Transportation Co. to the City of Mobile, Dr.

Taxes for 1897.

Value of real estate	$15,000	
Live stock and vehicles of any description		
Machinery and tools of any description		
Furniture of any description—libraries, watches, plate, pianos, guns, &c.		
Goods and merchandise		
Capital employed, money loaned, &c.		
Money invested in stock, bonds, water craft, &c.		
Dividends, commissions, premiums, &c.		
Say tax on	$15,000 at $\frac{6}{10}$ per cent...	90 00
Collector's fees		50
Rebate		
Penalties		
Costs		
		$90 50

Received payment.
Mobile, —— —, 189–.

——— ———,
Tax Collector.

The city taxes assessed against you for the year 1897, as per above bill, are now due, and you are required to come forward and pay such taxes and costs immediately. A penalty of one per cent. per month will be added to the amount now due, commencing August 1, 1897.

(Here follows map marked page 72*a*.)

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EXHIBIT "I."

In the Circuit Court.

THE CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION CO. ET AL. } No. 8597.

The defendant moves the court to retax the costs in this cause because the same are excessive in this: costs of the witnesses summoned by the plaintiff, as follows:

George A. Cleveland, Capt. Thomas Deering, Capt. Hank Warren, Jake Harvey, Richard Sims, Jake Mincher, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, George Hayward, because none of said witnesses were examined.

Also because the witnesses above named were all called to prove one matter of fact and to prove which the defendant had also summoned the witness D. M. N. Ross.

FREDK G. BROMBERG,
Defendant's Attorney.

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EXHIBIT "K."

Circuit Court, Mobile County.

THE CITY OF MOBILE, Plaintiff,
vs.
MOBILE TRANSPORTATION CO., Defendant. } No. —.

Bill of Costs.

Clerk's fees.

	Dollars.	Cents.	
Each summons and complaint	1.25	1.25	
Each copy thereof	.50	.50	
Making copy thereof when over 200 words, each 100	.20		
Entering sheriff's return or copy	.20	.20	
Docketing	.25	.25	
Entering appearance	.20	.20	
Filing, each	.10	.40	
Every order made in court	.50	2.10	
Copy thereof	.25		
Every trial, with or without jury	.75		
Entering up judgment or copy thereof	.30		
Scire facias or notice in the nature thereof	.75	4.50	
Every execution	.50		
Entering return on execution	.20		
Issuing subpœna for each witness	.30		
Entering sheriff's return on same	.20		
	.50	8.00	
Administering oath not relating to trial	.25		
Issuing each attachment and taking bond	1.00		
Filing attachment	.75		
Each summons for garnishee in attachment	.50		
Taking answer of garnishee	.50		
Filing each deposition	.20		
Final record, per 100 words	.20	6.00	
Copy of each paper, per 100 words	.20		

Sheriff's fees.

	Dollars.	Cents.	
Levying attachment and return	1.75		
Summoning garnishee	1.30		
Serving summons or other mesne process and returning same	1.30	1.30	
Summoning each witness	.65	11.60	
Empanneling jury in each case	.75		
Making deed	2.50		
Commissions, notice, and return		3.25	
		16.15	
Commissioner's fees		50.50	
Witness' fees			

Recapitulation.

Judgment		
Clerk, Jackson		27.40
"		
Sheriff, McLean		16.15
"		
Justice		
Witness'		50.50
Commissioner's		
Stenographer's fees		
		94.05

Each order of continuance	.10	
Issuing commission to take deposition	.75	
Recording award, per 100 words	.50	
Issuing execution or attachment thereon	1.00	
Taking bond for certiorari and copy	.75	
Order to advertise to survey or copy	.50	
Recording survey, &c., 15c. per 100 words, or	.25	
Ad quo damnum	.75	
Recording return, 15c. per 100 words, or	.50	
Certiorari, prohibition, or mandamus	.75	
Filing same and return	.15	
Every certificate requiring seal	.75	
Taking bond, not otherwise provided for	.75	
Every necessary certificate	.25	4.00
		27.40

Costs to June 4th, 1897.

75 EXHIBIT "L."

STATE OF ALABAMA, }
Mobile County. }

Before me, B. F. Jackson, clerk of the circuit court for Mobile county, Alabama, personally appeared Harry T. Smith, who, being duly sworn, says that he is one of the attorneys of record for plaintiff in the case of City of Mobile *vs.* Mobile Transportation Company in the circuit court of Mobile, and that the witness Thomas Deering and Hank Wren are pilots or masters of vessels plying Mobile bay and river, and that they have passed the property, the subject-matter of said suit, many times daily, or almost daily, for may years, and that they knew and would have sworn to the fact that the water line of the property in question was much further inland or westward at the time plaintiff first acquired title, in 1866 or 1867, and that the testimony of said witness was material had said fact been one of the issues of the case; that all of the witnesses summoned for plaintiff were summoned only after careful consideration and upon the belief that they would be necessary to plaintiff's cause had the court ruled that the questions of the location of said water line and of adverse possession for ten years and adverse possession for twenty years were proper and material issues in said cause, and that none of said witnesses were summoned without good cause or for the purpose of vexing or harassing or oppressing the defendant or for any other purpose than *bona fide* doing an attorney's duty in such cases.

HARRY T. SMITH.

Subscribed and sworn to before me this 14th day of June, 1897.

B. F. JACKSON, *Clerk.*

EXHIBIT "M."

STATE OF ALABAMA, }
Mobile County. }

Before me, B. F. Jackson, clerk of the circuit court for Mobile county, Alabama, personally appeared Richard W. Stoutz, who, being duly sworn, says he is one of the attorneys of said circuit court and that he was associated with Gregory L. & H. T. Smith as attorney for plaintiff in the case of The City of Mobile *vs.* Mobile Transportation Company, No. 8597, on the docket of the circuit court of Mobile; that the paper Exhibit "A" hereto — is the abstract of the title upon which the defendant would rely in said cause, which abstract was served by defendant's attorney upon said Gregory L. & H. T. Smith in response to their demand therefor in said cause; that under said abstract had defendant's contention prevailed the adverse possession by defendant for ten years and adverse possession for twenty years
76 would have been material issues in the cause, and it would have been material to locate by proper evidence before the jury the present and ancient water lines upon the property the subject-matter of said suit; that common prudence and duty to their client required the plaintiff's attorney to be prepared with proper evidence on said issues of adverse possession and said location of said water lines, and that the propriety of said issues as issues in the cause was strenuously argued by defendant's attorney at said trial; that the witnesses Jake Harvey, D. M. N. Ross, Richard Sims, Jake Minchener, Joe Lee, Primus Lee, alias Jake Bennett; Mose Wright Gatewood, Tom Dennis, Edmund Dennis, and George Hayward were each summoned by plaintiff to testify upon said issues had the necessity arisen therefor; and affiant further states that he had conversed with the first seven of above-named witnesses and from their statements to affiant he verily believes they would have been material witnesses for plaintiff on said issues; that he is informed that the other witnesses above named would have sworn to substantially the same facts as the first seven above named, and believes said others were also material witnesses for plaintiff in said issues. Affiant further states that on the 4th day of June, 1897, when defendant applied for and obtained leave of the court to withdraw pleas and file demurrers, said leave was given only upon condition that defendant pay all costs accrued in the cause up to that time, which condition defendant then and there accepted, and the attorney for the defendant then and there availed himself of said leave and filed demurrers and promised that said costs would be paid or that he would endeavor to have them paid (affiant does not remember definitely which) within a short time thereafter. Affiant further states that from his conversation with said first seven witnesses above named he believes that they would have testified to the nature of the improvements alleged to have been placed on said property by those under whom defendant claims, and probably to the value of said improvements. If they would or could not testify to said value

r would have testified to such facts as would have been a mate- aid to the jury in ascertaining the true value of said improve- nts; that said witnesses are familiar with said property for various gths of time, some of them being familiar *with* a much longer e than the others, and that most of them performed their daily labor on or near the property in question.

RICHARD W. STOUTZ.

ubscribed and sworn to before me this 14th day of June, 1897.

B. F. JACKSON, *Clerk*.

EXHIBIT "N."

In the Circuit Court.

CITY OF MOBILE
vs.
THE MOBILE TRANSPORTATION COMPANY ET AL. } No. 8597.

The defendant moves the court to set aside the verdict and judg- ent rendered in this cause and grant it a new trial for the follow- g reasons:

1st. Because the court erred in overruling the first demurrer of e defendant to the complaint, filed March 18, 1897.

2nd. Because the court erred in overruling the 2nd demurrer of e defendant to the complaint, filed March 18, 1897.

3rd. Because the court erred in overruling the third demurrer of e defendant to the complaint, filed March 18, 1897.

4th. Because the court erred in overruling first ground of de- urrer of the defendant to the complaint, filed June 4th, 1897.

5th. Because the court erred in overruling the second ground of emurrer of the defendant to the complaint, filed June 4th, 1897.

6th. Because the court erred in overruling the third grounds of emurrer of the defendant to the complaint, filed June 4, 1897.

7th. Because the court erred in overruling the fourth ground of e demurrer of the defendant to the complaint, filed June 4th, 1897.

8th. Because the court erred in striking out the second plea of the efendant, file- May 1st, 1897.

9th. Because the court erred in striking out the third plea of the efendant, filed May 1st, 1897.

10th. Because the court erred in striking out the fourth plea of he defendant, filed May 1st, 1897.

11th. Because the court erred in striking out the fifth plea of the efendant, filed May 1st, 1897.

12th. Because the court erred in giving the charges in writing equested by the plaintiff.

13th. Because the court erred in giving oral charges given to the ury in this cause.

14th. Because the court erred in instructing the jury to 78 find for the plaintiff.

15th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "A."

16th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "B."

17th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "C."

18th. Because the court erred in refusing to give the charges in writing requested by the defendant marked "D."

19th. Separately, because the error of the court in excluding offers of evidence by defendant and excluded by the court.

20th. Separately, to the overruling of each objection made by the defendant to the testimony offered by the plaintiff.

21st. Separately, to the admission of the testimony offered by the plaintiff in each case wherein objected to by the defendant.

FRED'K G. BROMBERG,
Defendant's Attorney.

This bill of exceptions and the exhibits thereto marked Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "K," "L," "M," and "N," filed in office this 31st day of July, 1897.

B. F. JACKSON, *Clerk.*

Order as to Bond.

In the Circuit Court of Mobile, Ala.

CITY OF MOBILE, Plaintiff,
vs.
THE MOBILE TRANSPORTATION CO., Def't. } Order

MOBILE, ALA., *August* 3, 1897.

It is ordered that in addition to the bond required in section 2623, Code of 1886, the defendant, in order to supersede the judgment rendered in the above-entitled cause, pending its appeal to the supreme court of Alabama, from said judgment, must execute bond, with good and sufficient sureties, payable to the clerk of the said circuit court, in the sum of three hundred dollars, conditioned as required by law.

WM. S. ANDERSON,
Judge 13th Judicial Circuit.

79 *Bond.*

THE STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that we, the Mobile Transportation Company, as principal, and Leopold Lowenstein and Charles D. Willoughby, are held and firmly bound unto the City of Mobile, a municipal corporation of Alabama, heirs, executors, or administrators, in the sum of one hundred and thirty ($130.00) dollars; for the payment of which we jointly and severally bind ourselves and heirs, executors, or administrators firmly by these presents.

Sealed with our seals and dated this 11th day of August, A. D. 1897.

The condition of the above obligation is such that whereas the above-bounden The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, has this day applied for and obtained an appeal, returnable to the November term, 1897, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said city of Mobile in an action of ejectment against the said Mobile Transportation Company, at the spring term, 1897, of the circuit court of Mobile for Mobile county, for sixty-five ($65.00) dollars for the rent of the premises sued for, besides costs:

Now, if the said Mobile Transportation Company shall prosecute to effect its said suit in the supreme court of the State of Alabama and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

MOBILE TRANSPORTATION COMPANY,
By JAS. H. CUTLER, *Treas.* [SEAL.]
LEOPOLD LOWENSTEIN. [SEAL.]
CHAS. D. WILLOUGHBY. [SEAL.]

In presence of—
CHAS. C. JOHNSON.

Filed 11th day of August, 1897.

B. F. JACKSON, *Clerk.*

Bond.

THE STATE OF ALABAMA, }
Mobile County. }

Know all men by these presents that we, the Mobile Transportation Company, a corporation, as principal, and Leopold Lowenstein and Chas. D. Willoughby, as sureties, are held and firmly bound unto the City of Mobile, a municipal corporation under the laws of Alabama, its successors or assigns, in the sum of three hun-
80 dred ($300.00) dollars; for the payment of which we jointly and severally bind ourselves and heirs, executors, or administrators firmly by these presents.

Sealed with our seals and dated this 11th day of August, A. D. 1897.

The condition of the above obligation is such that whereas the above-bounded Mobile Transportation Company has this day applied for and obtained an appeal returnable to the fall term, 1897, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said City of Mobile in an action of ejectment against the said Mobile Transportation Company at the spring term, 1897, of the circuit court of Mobile, for Mobile county, wherein it was adjudged that the said City of Mobile as plaintiff recover of Mobile Transportation Company as defendant the following-described real property, viz: Commencing on the south line of the middle division of the Bernoudy tract, where said boundary intersects the high-water mark, said point being eleven hundred and

fifty-six feet east of the west line of Water street, measured on said boundary line, thence south eighty-two degrees east 400 feet, more or less, to the channel line adopted by the Mobile River commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of the Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning.

Now, if the said Mobile Transportation Company shall prosecute to effect its said suit in the supreme court of the State of Alabama and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

MOBILE TRANSPORTATION CO.,
By JAS. H. CUTLER, *Treas.* [SEAL.]
LEOPOLD LOWENSTEIN. [SEAL.]
CHAS. D. WILLOUGHBY. [SEAL.]

In presence of—
CHAS. C. JOHNSON.

Filed in office August 11th, 1897.

B. F. JACKSON, *Clerk*, &c.

81 *Citation in Appeal.*

THE STATE OF ALABAMA, }
Mobile County. }

Circuit Court.

To the sheriff of Mobile county, Greeting:

Whereas, at a term of the circuit court of Mobile for Mobile county, held on the fourth Monday after the fourth Monday in March, 1897, in a certain cause in said court wherein The City of Mobile, a municipal corporation, was plaintiff and The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, was defendant, a judgment was rendered against said The Mobile Transportation Company, a corporation, &c., to reverse which judgment the said The Mobile Transportation Company, a corporation organized under the laws of the State of Alabama, has on this day applied for and obtained from this office an appeal, returnable to the November term of our supreme court of the State of Alabama, to be held at Montgomery on the 2nd day of November next, and the necessary bonds having been given by the said The Mobile Transportation Company, a corporation, &c., with Leopold Lowenstein and Chas. D. Willoughby, sureties:

Now, you are hereby commanded, without delay, to cite the said The City of Mobile, a municipal corporation, &c., or Gregory L. & H. T. Smith, attorney-, to appear at the November term of our said

supreme court to defend against the said appeal if they think proper.

Witness B. F. Jackson, clerk of the circuit court of said county, this 11th day of August, A. D. 1897.

Attest:

B. F. JACKSON, *Clerk.*

Sheriff's Return.

Received August 11th, 1897, and on the same day I served a copy of the within citation in appeal on Harry T. Smith, one of the firm of G. L. & H. T. Smith.

CHAS. E. McLEAN, *Sheriff,*
By J. A. SHELTON, *D. S.*

Certificate of Appeal.

In the Circuit Court of Mobile County.

CITY OF MOBILE, a Municipal Corporation in Alabama,
vs.
THE MOBILE TRANSPORTATION COMPANY, a Corporation Organized under the Laws of Alabama.

82 I, B. F. Jackson, clerk of the circuit court in and for Mobile county, State of Alabama, do hereby certify that in the above-entitled cause a judgment was rendered by the circuit court in and for Mobile county, State of Alabama, in favor of the City of Mobile, a municipal corporation, and against the Mobile Transportation Company, a corporation, on the 5th day of June, A. D. 1897, for lands described in the complaint and sixty-five ($65.00) dollars for the detention and costs of court, and that on the 11th day of August, A. D. 1897, the said Mobile Transportation Company, a corporation, &c., applied for and took an appeal from said judgment, and the necessary bonds having been given with Leopold Lowenstein and Chas. D. Willoughby, as security, which said appeal was made returnable to the November term of the supreme court of the State of Alabama, to be held at Montgomery on the 2nd day of November next.

Witness my hand this the 11th day of August, A. D. 1897.

Attest:

B. F. JACKSON, *Clerk.*

Filed in office August 11th, A. D. 1897.

B. F. JACKSON, *Clerk.*

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA, }
Mobile County. }

I, B. F. Jackson, clerk of the circuit court in and for said State and county, do hereby certify that the foregoing eighty-one (81) pages and twelve (12) lines of typewritten matter contain a full,

true, and correct transcript of the record and proceedings had in the said circuit court in a certain cause therein lately pending wherein The City of Mobile, a municipal corporation in Alabama, was plaintiff and The Mobile Transportation Company, a corporation organized under the laws of Alabama, was defendant, as the same remains of record in my office.

In witness whereof I hereunto set my hand and affix [SEAL.] the seal of said court, at office in the city of Mobile, this the 16th day of August, A. D. 1897.

B. F. JACKSON,
Clerk Circuit Court, Mobile County, Alabama.

83 *Assignments of Error.*

The circuit court erred as follows, viz:

1. In overruling appellant's demurrer to the complaint filed March 19, 1897. Trans., p. 3, 4, 18.
2. In overruling appellant's first cause of demurrer to said complaint. " "
3. In overruling appellant's second cause of demurrer to said complaint. " "
4. In overruling appellant's third cause of demurrer to said complaint. " "
5. In overruling appellant's demurrer to the complaint filed June 4, 1897. " p. 10, 11, 18.
6. In overruling appellant's first cause of demurrer to complaint filed June 4, 1897. " "
7. In overruling appellant's second cause of demurrer to the complaint filed June 4, 1897. " "
8. In overruling appellant's third cause of demurrer to the complaint filed June 4, 1897. " "
9. In overruling appellant's fourth cause of demurrer to the complaint filed June 4, 1897. " "
10. In adjudging that the showing made by appellee's attorneys of their right to represent the city of Mobile was sufficient. " p. 4, 5, 17.
11. In granting appellee's motion to strike out the second plea. " p. 5, 9, 19.
12. In granting appellee's motion to strike *and* the third plea. " p. "
13. In granting appellee's motion to strike out the fourth plea. " " 6, 9, 19.
14. In granting appellee's motion to strike out the fifth plea. " " 7, 9, 19.
15. In granting appellee's motion to strike out the sixth plea. " " "
16. In recovering the judgment June 5th, 1897. " " 12, 19.
17. In refusing to set aside the verdict and jedgement in this cause and to grant appellant a new trial. " " 14, 15.

18. In refusing appellant's motion to retax the costs in this cause, June 15th, 1897. " " 13, 59.

19. In overruling appellant's objection to the introduction in evidence by appellee of the act of Congress approved March 2nd, 1819, entitled "An act to enable the people of the Alabama Territory to form a constitution," etc. " " 19.

20. In admitting said act as evidence to go to the jury. " " "

21. In overruling appellant's objection to the introduction in evidence of the ordinance of Aug. 2nd, 1819, and the constitution of the State of Alabama, adopted in 1819, to be found in p. 68, Code of Ala. 1876, as evidence to go to the jury. " " 20.

84 22. In admitting said ordinance and constitution as evidence to go to the jury. Trns., p. 20.

23. In overruling appellant's objection to appellee's introducing in evidence the resolution of the Congress of the United States of *D. C.* Dec. 14th, 1819, declaring the admission of the State of Alabama into the Union. " " 20.

24. In admitting said resolution as evidence to go to the jury. " " 20.

25. In overruling appellant's objection to appellee's introducing in evidence the act of the General Assembly approved Jan'y 31st, 1867, entitled "An act granting to the city of Mobile the riparian rights in the river front." " " 21.

26. In admitting said act as evidence to go to the jury. " " 21.

27. In overruling appellant's first ground of objection to the introduction of said act as evidence to go to the jury. " " 21.

28. In overruling appellant's second ground of objection to the introduction of said act as evidence to — the jury. " " 21.

29. In overruling the appellant's third ground of objection to such evidence. " " "

30. In overruling appellant's fourth ground of objection to such evidence. " " "

31. In overruling appellant's fifth ground of objection to such evidence. " " "

32. In overruling appellant's sixth ground of objection to such evidence. " " "

33. In overruling appellant's seventh ground of objection to such evidence. " " 22.

34. In overruling appellant's eighth ground of objection to such evidence. " " "

35. In overruling appellant's ninth ground of objection to such evidence. " " "

36. In overruling appellant's tenth ground of objection to such evidence. " " "

37. In overruling appellant's eleventh ground of objection to such evidence. " " 21.

38. In overruling appellant's objection to the introduction as evidence for the jury of the act to incorporate the city of Mobile, Pamphlet Acts Ala. 1866, p. 202. " " "

39. In admitting said act as evidence to go to the jury.

40. In overruling appellant's objection to the introduction *of* evidence of the act approved February 18th, 1895, Pamphlet Acts Ala. 1894–'5, page 815, entitled "An act to fix the right of the city of Mobile to certain real estate." " " 22.

41. In admitting said act as evidence *as evidence* to go to the jury. " " "

42. In overruling appellant's objection to the introduction as evidence of the act of the General Assembly approved December 5th, 1896, Pamphlet Acts Ala. 1876–'7, p. 50, entitled An act to amend an act to fix the right of the city of Mobile in certain real estate, approved February 18th, 1895. " " "

85 43. In admitting said act as evidence to go to the jury. Tr., p. 22.

44. In sustaining t[illegible]ppellee's objection to so much of volume [illegible]erican State Papers, in relation to public la[illegible] as forms part of the register of claims to land in the district east of Pearl river, &c., being claim No. 11 of Regis Bernoudy, page 30 of said volume. " " 23.

45. In excluding said evidence from the jury. " " "

48. In sustaining appellee's objection to the introduction of the foregoing evidence referred to in the 44th, 45th, 46th, & 47th assignments of error, as color of title. " " 25.

46. In sustaining appellee's objection to so much of said volume 3, Am. State Papers, as relates to said claim of Regis Bernoudy, as report No. 9, pages 400, 401, 402.

47. In excluding said evidence from the jury. " " "

49. In excluding from the jury the evidence referred to in the 48th exception. " " "

50. In sustaining the appellee's objection to the introduction in evidence of the treaty of 1819 between the United States and Spain. " " 24.

51. In excluding said treaty as evidence from the jury. " " 25.

52. In sustaining appellee's objection to the

introduction in evidence of the 8th article of said treaty.	"	"	25.
53. In excluding said evidence from the jury.	"	"	"
54. In sustaining the appellee's objection to the introduction in evidence of the patent of the United States to Poe & Robertson and Mac.	"	"	"
55. In excluding said evidence from the jury.	"	"	"
56. In sustaining appellee's objection to the copy of the field-notes of the Regis Bernoudy tract.	"	"	26.
57. In excluding said evidence.	"	"	27.
58. In sustaining appellee's objection to deed "A."	"	"	28.
59. In excluding said deed as evidence.	"	"	"
60. In sustaining appellee's objection to deed "B."	"	"	29.
61. In excluding said deed from evidence.	"	"	30.
62. In sustaining appellee's objection to deed "C."	"	"	"
63. In excluding said deed from evidence.	"	"	"
64. In sustaining appellee's objection to deed "D."	"	"	"
65. In excluding said deed from evidence.	"	"	"
66. In sustaining appellee's objection to deed "E."	"	"	"
67. In excluding said deed from evidence.	"	"	"
68. In sustaining appellee's objection to deed "F."	"	"	"
69. In excluding said deed from evidence.	"	"	"
70. In sustaining appellee's objection to deed "G."	"	"	"
71. In excluding said deed from evidence.	"	"	"
72. In sustaining appellee's objection to deed "H."	"	"	"
73. In excluding said deed from evidence.	"	"	"
74. In sustaining appellee's objection to deed "I."	"	"	"
86 75. In excluding said deed from evidence.	Tp.,	p.	30.
76. In sustaining appellee's objection to deed "J."	"	"	31.
77. In excluding said deed from evidence.	"	"	"
78. In sustaining appellee's objection to deed "K."	"	"	"
79. In excluding said deed from evidence.	"	"	"
80. In sustaining appellee's objection to deed "L."	"	"	"
81. In excluding said deed from evidence.	"	"	"
82. In sustaining appellee's objection to deed "M."	"	"	31.
83. In excluding said deed from evidence.	"	"	"

84. In sustaining appellee's objection to deed "N." " " 32.
85. In excluding said deed from evidence. " " "
86. In sustaining appellee's objection to deed "O." " " "
87. In excluding said deed from evidence. " " "
88. In sustaining appellee's objection to deed "P." " " "
89. In excluding said deed from evidence. " " 33.
90. In sustaining appellee's objection to deed "Q." " " "
91. In excluding said deed from evidence. " " "
92. In sustaining appellee's objection to deed "R." " " "
93. In excluding said deed from evidence. " " "
94. In sustaining appellee's objection to deed "S." " " 34.
95. In excluding said deed from evidence. " " "
96. In sustaining appellee's objection to deed "T." " " "
97. In excluding said deed from evidence. " " "
98. In sustaining appellee's objection to deed "U." " " 35.
99. In excluding said deed from evidence. " " "
100. In sustaining appellee's objection to deed "V." " " "
101. In excluding said deed from evidence. " " "
102. In sustaining appellee's objection to deed No. 22. " " "
103. In excluding said deed from evidence. " " "
104. In sustaining appellee's objection to deed No. 26. " " 36.
105. In excluding said deed from evidence. " " "
106. In sustaining appellee's objection to deed No. 28. " " "
107. In excluding said deed from evidence. " " "
108. In sustaining appellee's objection to deed No. 30. " " "
109. In excluding said deed from evidence. " " "
110. In sustaining appellee's objection to deed No. 31. " " 38.
111. In excluding said deed from evidence. " " "
112. In sustaining appellee's objection to deed No. 32. " " 39.
113. In excluding said deed from evidence. " " "
114. In sustaining appellee's objection to deed No. 35. " " "
87 115. In excluding said deed from evidence. Tp., p. 39.
116. In sustaining appellee's objection to deed No. 37. " " 40.

117. In excluding said deed from evidence. " " "
118. In sustaining appellee's objection to deed No. 38. " " 41.
119. In excluding said deed from evidence. " " "
120. In sustaining appellee's objection to the will of Jonathan Emanuel. " " 42.
121. In excluding said will from evidence. " " "
122. In sustaining appellee's objection to the will of R. Purvis. " " 47.
123. In excluding said will from evidence. " " "
124. In sustaining appellee's objection to the will of H. Munroe. " " "
125. In excluding said will from evidence.
126. In sustaining appellee's objection to the will of A. C. Holcombe. " " "
127. In excluding said will from evidence. "
128. In sustaining appellee's objection to the tax-list of 1865–1878. " " "
129. In excluding said tax-lists from evidence. " " "
130. In sustaining appellee's objection to the evidence of the parties who paid said taxes. " " 50.
131. In excluding the evidence of said parties.
132. In sustaining appellee's objection to the tax-lists of 1879–1897. " " "
133. In excluding said tax-lists from evidence. " " "
134. In sustaining appellee's objection to the tax receipt for 1894. " " "
135. In excluding said receipt from evidence. " " "
136. In sustaining appellee's objection to the tax receipt for 1895. " " "
137. In excluding said tax receipt from evidence. " " "
138. In sustaining appellee's objection to the tax receipt — 1896. " " "
139. In excluding said tax receipt for 1896 from evidence. " " "
140. In sustaining appellee's objection to the tax bill for 1897. " " "
141. In excluding said tax bill from evidence. " " "
142. In sustaining appellee's objection to oral evidence offered by appellant to show that the assessment upon which tax bills are based and the descriptions therein refer to the lands sued for, and that the taxes assessed have been paid by appellant and its grantors. " " 51.
143. In excluding said evidence from the jury. " " "
144. In sustaining appellee's objection to the

question to Wm. Barnewall, viz: "Did you ever have charge or control of said lands?" " " "

88 145. In excluding said evidence from the jury. Tr., p. 51.

146. In sustaining appellee's objection to the question to said witness, viz: "Did you or not ever drive piling, etc.?" " " "

147. In excluding said evidence from the jury. " " "

148. In sustaining appellee's objection to the question to said witness, viz: "When was it you drove those pilings?" " " 52.

149. In excluding said evidence from the jury.

150. In sustaining appellee's objection to the question to said witness, viz: "Did you or not pay taxes, etc.?" " " "

151. In excluding said evidence from the jury.

152. In sustaining appellee's objection to the question to said witness, viz: "Look at the copy of tax-lists of 1865–1878, etc." " " "

153. In excluding said evidence from the jury.

154. In sustaining appellee's objection to the question to said witness, viz: "Look at said tax-list- of 1879–1897, etc." " " "

155. In excluding said evidence from the jury. " " "

156. In sustaining appel-ee's objection to offer of evidence of Barnewall, Hogan, and others to show adverse possession for twenty years. " " 53.

157. In excluding said evidence from the jury. " " "

158. In sustaining appellee's objection to the question to the witness Ross as to lands described in the complaint being same as described in the field-notes. " " "

159. In excluding said evidence from the jury. " " "

160. In sustaining appel-ee's objection to the question to said witness, viz: "State is there anything known on the river front as a fixed high-water-mark line, etc." " " 54.

161. In excluding said evidence from the jury. " " "

162. In sustaining the appellee's objection to the answer of said witness, viz: "I know that the ballast was valuable there for filling in." " " "

163. In excluding said evidence from the jury. " " "

164. In sustaining appellee's objection to the

question to said witness, viz: "Whether there had been any filling done on the property marked 'Emanuel.'" " " "

165. In excluding said evidence from the jury. " " "

166. In sustaining appellee's objection to the question to said witness, viz: "How long ago did you first notice any filling on part marked 'Emanuel?'" " " "

167. In excluding said evidence from the jury. " " "

168. In sustaining appellee's objection to the question to said witness, viz: "Whereabouts did Barnewall drive the piling?" " " "

169. In excluding said evidence from the jury.

170. In sustaining appellee's objection to the question to said witness, viz: "Are there or not wharves in front of the land?" " " 55.

89 171. In excluding said evidence from the jury. Tp., p. 55.

172. In sustaining appellee's objection to the question to said witness, viz: "Is there or not the bed of a railroad track, etc., upon this land?" " " "

173. In excluding said evidence from the jury.

174. In sustaining appellee's objection to the question to said witness, viz: "How long ago was said grading built?" " " "

175. In excluding said evidence from the jury. " " "

176. In sustaining the appellee's objection to the question to the witness Hogan, viz: "Did you ever make improvements, &c.?" " " "

177. In excluding said evidence from the jury.

178. In sustaining the appellee's objection to the question to said witness whether he had made improvements east of line 1–4. " " 56.

179. In excluding said evidence from the jury. " " "

180. In sustaining appellee's objection to the question to said witness, viz: "What is the value of the improvements made, etc.?" " " "

181. In excluding said evidence from the jury.

182. In sustaining the appellee's objection to the question to said witness whether the improvements were not made more than three years.

183. In excluding said evidence from the jury. " " "

184. In sustaining appellee's objection to the question to said witness, Whether or not he had made improvements on the land marked Emanuel, etc. " " "

185. In excluding said evidence from the jury.

186. In sustaining appellee's objection to the question to said witness, "How long ago said improvements were made?" " " "

187. In excluding said evidence from the jury. " " "

188. In sustaining appellant's objection to the question to said witness, "What is the value of said improvements?" " " 57.

189. In excluding said evidence from the jury. " " "

190. In sustaining appellee's objection to the separate offers in evidence of the tax-lists and receipts, Exhibits B, C, D, E, F, and G to this bill of exceptions. " " "

191. In excluding said evidence from the jury. " " "

192. In sustaining appellee's objection to the separate offers in evidence of vol. 3, American State Papers, field-notes of sec. 38, United States patent to Poe, Robertson & McCloskey, deeds and copies of deeds and of wills as offered before and now offered as color of title. " " "

193. In excluding said evidence from the jury. " " "

194. In granting appellee's request to charge the jury for it. " " "

195. In giving the general charge for the appellee. " " "

90 196. In sustaining appellee's objection to first charge requested by appellant. Tr., p. 58.

197. In refusing to give the first charge requested by appellant. " " 59.

198. In sustaining appellee's objection to second charge requested by appellant. " " "

199. In refusing to give second charge requested by appellant.

200. In sustaining appellee's objection to third charge requested by appellant. " " "

201. In refusing to give the third charge requested by appellant. " " "

202. In sustaining appellee's objection to fourth charge requested by appellant. " " "

203. In refusing to give fourth charge requested by appellant. " " "

FRED'K G. BROMBERG,
Appellant's Attorney.

91 *Minutes and Orders of the Supreme Court of Alabama.*

Supreme Court, Wednesday, Dec. 8, 1897.

The court met pursuant to adjournment.
Present: All the justices.

Mobile Circuit Court.

MOBILE TRANSPORTATION CO. vs. THE CITY OF MOBILE. } 1 Div., 961.

Come the parties, by attorneys, and argue and submit this cause for decision.

And the court adjourned until Thursday, Dec. 9, 1897, at ten o'clock a. m.

Supreme Court, Thursday, Dec. 20, 1900.

The court met pursuant to adjournment.
Present: All the justices.

Mobile Circuit Court.

MOBILE TRANSPORTATION CO. vs. CITY OF MOBILE. } 1 Div., 961.

Come the parties, by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of the circuit court there is no error. It is therefore considered that the judgment of the circuit court be in all things affirmed. It is also considered that the appellant and Leopold Lowenstein and Charles D. Willoughby, sureties on the appeal bond, pay the amount of the judgment of the circuit court and ten per centum damages thereon and interest, the cost of appeal of this court and of the circuit court.

And the court adjourned until Monday, January 14th, 1900, at 12 o'clock m.

92 THE STATE OF ALABAMA, }
Judicial Department. }

(*Opinion.*)

The Supreme Court of Alabama, November Term, 1900.

MOBILE TRANSPORTATION CO. }
v. } 1 Div., 961.
CITY OF MOBILE. }

Appeal from Mobile circuit court.

TYSON, *J.:*

The present case is an action of ejectment, in code form, by the city of Mobile to recover of the appellant certain real estate described in the complaint constituting the shore or part of Mobile river below high-water mark.

The plaintiff's title was derived from the State of Alabama through and by the act of the legislature approved January 31st, 1867, entitled "An act granting to the city of Mobile the riparian rights of the river front," supplemented by the acts of 18th February, 1895, and of December 5th, 1896, the latter being amendatory of the former and confirming and vesting all rights theretofore vested in any municipal corporation of Mobile in the city of Mobile.

If the act of 1867 was operative it is evident that the legal title to the shore of the river below high-water mark, as described in the act, under the rule of the common law, became vested in the city of Mobile. Though the property belonged to the United States before the admission of the State in the Union by the com-
93 pact under and by which Alabama became a State, the title to all lands not reserved to the United States became the property of the State of Alabama, it being well settled there was no reservation, and could be none, in the shores and beds of navigable streams, since such reservation would conflict with the fundamental law of organization under which new States are entitled to be on an equal footing with the original States, as well as with the constitution restricting the municipal jurisdiction of the United States to the particular cases enumerated therein. Pollard *v.* Hagan, 3 How., 212; Escanaba *v.* Chicago, 107 U. S., 689; Huse *v.* Glover, 119 U. S., 546; Sands *v.* Improvement Co., 123 U. S., 296; Williamette Bridge Co. *v.* Hatch, 125 U. S., 9; Shively *v.* Bowlby, 152 U. S., 1.

The chief important question is whether the act of 1867 is a valid law. The appellant insists that it is void because its title does not sufficiently describe the purpose of the body of the act. The constitution of 1865, under which this law was enacted, required that "each law should embrace but one subject, which shall be described in the title." Art. 4, § 2, Const. 1865. The title is "An act granting to the city of Mobile the riparian rights in the river front," while the body grants the fee. The objection is that "riparian

rights" could not comprehend the fee, but only easements therein, distinct from absolute ownership. The object of this provision of the constitution was to prevent surprise and fraud in passing laws under misleading titles. It should not, therefore, be construed so as to defeat, by too technical an application, legislation not clearly within the evil aimed at. If the title of an act is single and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied. In such case the generality of a title, not defining the particulars of the proposed legislation, would be more apt to excite general attention than otherwise, since the general words would give warning that everything within their limits might be affected and thus draw the attention of the whole body of legislators, while narrower words would only interest those concerned with the matters specially named. It is, therefore, held that the generality of the title is no objection if it may 94 comprehend the particulars of the body of the act, and that the act must be upheld if the subject may be comprehended in the title. Adler *v.* State, 55 Ala., 21; Ballentine *v.* Wickersham, 75 Ala., 536; Quattlebaum *v.* State, 79 Ala., 1; Edwards *v.* Williams, 70 Ala., 145; 23 Ency. Law (1st ed.), 229–235.

In this case the body of the act grants the fee in the *locus in quo*; the title, "riparian rights." The question is, May not "rights" comprehend absolute rights or property, to wit, a fee; and may not "riparian" be taken as a mere localizing term to "rights?" The first definition of the word riparian in the Century Dictionary is "pertaining to or situated on the bank of a river." We think the fair and reasonable meaning of the title is to grant rights (property) which are riparian—that is, situated on or along the bank (*ripa*) of the river. No great precision and nicety of language is necessary in such case. It is sufficient if the common and ordinary mind would understand from the title the subject in reference to which a particular law is proposed. We therefore hold the act in question free from the objection interposed to it.

The next question is whether the patent from the United States in 1836 to the persons under whom defendant claimed to the land adjoining the shore sued for extended to low-water mark and, if so, affected the previous title to the State to the land below high-water mark. We must decide both of these questions in the negative. It is true the first point was decided otherwise in the case of Webb *v.* Demopolis, 95 Ala., 126, and in one or two other cases relating to the shore line of streams above the ebb and flow of tide water: but these cases in nowise conflict with the common-law rule, so often approved by this court and other jurisdictions, that on streams where the tide ebbs and flows grants of adjoining lands only extend to the ordinary high-tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in Webb *v.* Demopolis to disturb this rule of property supported by a vast array of authorities without making reference to them. At common law, the adjoining owner of the shore would, in the case of Webb, have acquired title to the center of the

stream, but the decision restricted the rule, on account of the
95 actual navigability of the stream, to the line of low water. This cannot be a reason for enlarging the common-law rule as to tide-water shores which restricted the rights of adjoining owners to the line of high tide. Mobile *v.* Eslava, 9 Port., 577; S. C., 240; Goodtitle *v.* Kibbe, 1 Ala., 403; S. C., 9 How., 471; Kennedy *v.* Beebe, 8 Ala., 914; Pollard *v.* Greit, 8 Ala., 941; Pollard *v.* Hagan, 3 How., 212; Hoboken *v.* Pa. R. R. Co., 124 U. S., 688; Hallett *v.* Bebee, 13 How., 25; Shively *v.* Bowlby, *supra*, and the numerous authorities cited in brief of appellee's counsel.

But if the first point was decided otherwise, it cannot affect this case because the title of the United States to the shore in question, to the line of ordinary high tide, became vested in the State on and by its admission as a State, and could not be affected by any subsequent grant of the United States, if there had been such. Mobile *v.* Eslava, *supra*; Pollard *v.* Hagan, *supra*; Goodtitle *v.* Kibbe, *supra*; Shively *v.* Bowlby, *supra*.

It is next insisted that the State could not grant the fee to the city of Mobile and thereby divest itself of the trust under which the land was held. This court has decided that a deed by a trustee in violation of his trust nevertheless conveys the legal title and is valid in a court of law. Robinson *v.* Pierce, 118 Ala., 273. But the grant in this case was not in fraud of the trust. On the contrary, it was made for the purpose of making it effective for the public good. The shores of tide water in all the States are held in fee by the States, subject only to the reservation and stipulation that such streams should forever be and remain public highways, with the right in Congress to regulate commerce thereon. Pollard *v.* Hagan, *supra*; Martin *v.* Waddell, 16 Pet., 410; 4 Notes to U. S. Rep., 185 *et seq.*, and 412 *et seq.* And it cannot be doubted that the State may convey the fee in such shore, subject, of course, to the paramount rights of the United States respecting navigation, and particularly so when the conveyance is in furtherance of the public interests. St. Anthony Falls Co. *v.* Commissioners, 168 U. S., 360; Packer *v.* Bird, 37 U. S., 671; Hagan *v.* Campbell, 8 Port., 25; Williams *v.* Mayor, 105 N. Y., 433; Langdon *v.* Mayor, 93 N. Y., 129.

It is next insisted that the municipal corporation of Mobile was dissolved after the institution of this suit, and that the suit
96 cannot be further entertained. The modern doctrine is that the identity of a municipal corporation is not changed by the repeal of its charter and the substitution of a new municipal organization for substantially the same inhabitants and locality. When there is an alteration of name it may be convenient and proper for the pleadings to trace the change, but when the new organization bears the same name as the old and the courts take judicial notice of the laws effecting the change it is unnecessary to make any averment or obtain any order respecting the further prosecution of pending suits. Any authoritative appearance or step taken in the cause is the act of the new organization which comes in, not by revivor, as in the case of representatives on the death of natural persons, but as the same party metamorphosed only in the

external habiliments of organization and powers wrought by the new enactment. 1 Dillon on Mun. Corp., § 172 and note; Mobile *v.* Watson, 116 U. S., 289; Broughton *v.* Pensacola, 93 U. S., 270; Milner *v.* Pensacola, 17 Fed. Cases, 407; Girard *v.* Philadelphia, 7 Wall., 1.

It is manifest from a reading of the act of Feb'y 11, 1879 (Acts 1878–79, p. 381), that only such property as was possessed by the city of Mobile that was subject to the payment of its debts passed by the terms of the act to the commissioners as trustees for the bondholders. This property was trust property, and therefore was not subject to the debts of the city and was not affected by the act.

It was further insisted that ejectment will not lie for the recovery of the premises. There is nothing in this contention. No matter what the trust may be, the trustee or holder of the legal title may recover the possession from one who ousts him or claims to hold adversely. He may do this even against a *cestui que trust*. Without this right he might be unable to perform his duties, and it is of no consequence that the land or a portion of it is servient to the right of the flow of water over it or of navigation thereon. Newell on Ejectment, chap. 2, §§ 20, 21, 22; Hoboken *v.* Penn. R. R. Co., 124 U. S., 658; Barney *v.* Keokuk, 94 U. S., 324; Hardin *v.* Jordan, 140 U. S., 371; Mobile *v.* Eslava, *supra*.

The defendant offered evidence of adverse possession of the lands in controversy since the grant to the city of Mobile in
97 1867, which was rejected. There was no error in this, since there can be no limitation against a municipal corporation as to property held for the public. Dillon on Mun. Corp., § 675; Webb *v.* Demopolis, 95 Ala., 116; Olive *v.* State, 86 Ala., 94; Miller *v.* State, 38 Ala., 604. The presumption is that the property is public, and, indeed, the words of the grant make it such in this case. The wrong or error of collecting tax on public property on the same principle can create no estoppel against the assertion of the legal title, if it could have any effect on the right to such property. Hawkins *v.* Ross, 100 Ala., 463; McLeod *v.* Bishop, 110 Ala., 640; Goodman *v.* Winter, 64 Ala., 410. The plaintiff showed, by the evidence introduced, a valid legal title to the land sued for, unaffected by limitation or an estoppel of any character.

The defendant offered no evidence of title or possession which could have any operation to defeat the plaintiff's right of recovery. The supposed Spanish grant to so operate was never complete, and, besides, there was no proof of such a grant. The grant in 1836 by the United States cannot be construed to cover the land below high-water mark along the shore, and, if it could, would be ineffective because the title was divested out of the United States and vested in the State of Alabama on the admission of the State into the Union. The case of Goodtitle *v.* Kibbe, *supra*, is decisive of this point against the appellant. The title vested in the United States on the acquirement of the territory from France, and passed irrevocably to the State on its admission and could not be affected by any subsequent act of the United States. Pollard *v.* Hagan, *supra*. The possession by the defendant after the grant to the city in 1867 could not be adverse,

so as to put in operation the statute of limitations, so as to entitle the defendant to compensation for improvements, and as the plaintiff's declaration was good and its paper title perfect and no evidence was admitted or rejected which could legitimately affect the plaintiff's right to recover the shore land sued for below the high tide, there could be no error prejudicial to the appellant.

The defendant, however, insists that its third charge, limiting the plaintiff's right to recover the lands "covered by the description in the complaint," which is not now below high-water mark,
98 should have been given. The argument is that the description in the complaint takes the western line far inland—that is, west of the high-water line. We do not find this is the fact. The description distinctly limits the western line southwardly "along the high-water mark," which would necessarily limit the line to the high tide. Besides, the charge limits the recovery to the present high-tide line, which might be different from what it was when the grant was made or the suit commenced. There was no error, therefore, in the refusal of this charge.

Nor was there any error in the court's allowing public statutes and grants to be read in evidence when they constituted the title papers of the party. They constitute facts in the case and are evidence in the strictest sense which must go to the jury. It is the proper practice to read them to the jury as was done in Mobile *v.* Eslava. It is always allowable to prove any fact which the court knows judicially, and certainly no injury can possibly result where it is permitted to be done.

The authority of the attorney to bring the suit and represent the plaintiff was sufficiently shown. Williams *v.* Johnson, 21 L. R. A., 848 and note; Tullock *v.* Cunningham, 1 Cow., 256; Pixley *v.* Butts, 2 Cow., 421; Denton *v.* Noyes, 5 Am. Dec., 237.

After the rendition of the judgment the defendant made a motion to retax the costs in respect to fees of certain witnesses subpœnaed by the plaintiff. This motion was denied, and its refusal is here insisted upon as error. It may be conceded for the purposes of this appeal that the court committed an error in refusing to retax the costs, and yet this will not work a reversal of the judgment. The error, if committed, in nowise involves any ruling of the court upon the trial, but was subsequent to the rendition of the judgment and cannot be said to have induced its rendition or to have otherwise infected it. We must therefore decline to consider it further. M. J. & K. C. R. R. Co. *v.* Owen, 27 So. Rep., 612.

We have not deemed it necessary to notice in detail the many assignments of error, since the principles announced by us involve the adjudication of all of them against the appellant. There is no error in the record, and the judgment is affirmed.

Dec. 20th, 1900.

99 THE STATE OF ALABAMA, *Judicial Department.*

The Supreme Court of Alabama.

MOBILE TRANSPORTATION COMPANY, Appellant, *vs.* CITY OF MOBILE, Appellee. } 1 Div., 961.

Appeal from Mobile circuit court.

THE STATE OF ALABAMA, *City and County of Montgomery.*

I, Robert F. Ligon, Jr., clerk of the supreme court of Alabama, do hereby certify that the foregoing pages numbered from one to ninety-eight, inclusive, contain a full, true, and correct copy of the record of said supreme court in the above-stated cause, together with a true and correct copy of the order of submission, judgment, and opinion of said court, as the same appear of record and on file in this office.

Witness my hand and the seal of the supreme court of Alabama, at the capitol, this the 13th day of February, A. D. 1901.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON, JR.,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No., 18,084. Alabama supreme court. Term No., 589. The Mobile Transportation Company, plaintiff in error, *vs.* The City of Mobile. Filed March 20th, 1901.

Office Supreme Court U. S.
FILED
APR 13 1901
JAMES H. MCKENNEY.

Filed April 13, 1901.

the Supreme Court of the United States.

599

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

against

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,
Defendant in Error.

ON BEHALF OF THE PLAINTIFF IN ERROR, IN
PPOSITION TO THE MOTION OF DEFENDANT IN
RROR TO DISMISS OR CONFIRM THE JUDGMENT
F THE SUPREME COURT OF ALABAMA HERETO-
ORE ENTERED HEREIN.

FREDERICK G. BROMBERG,
Attorney for Plaintiff in Error.

AM B. PUTNEY,
Of Counsel.

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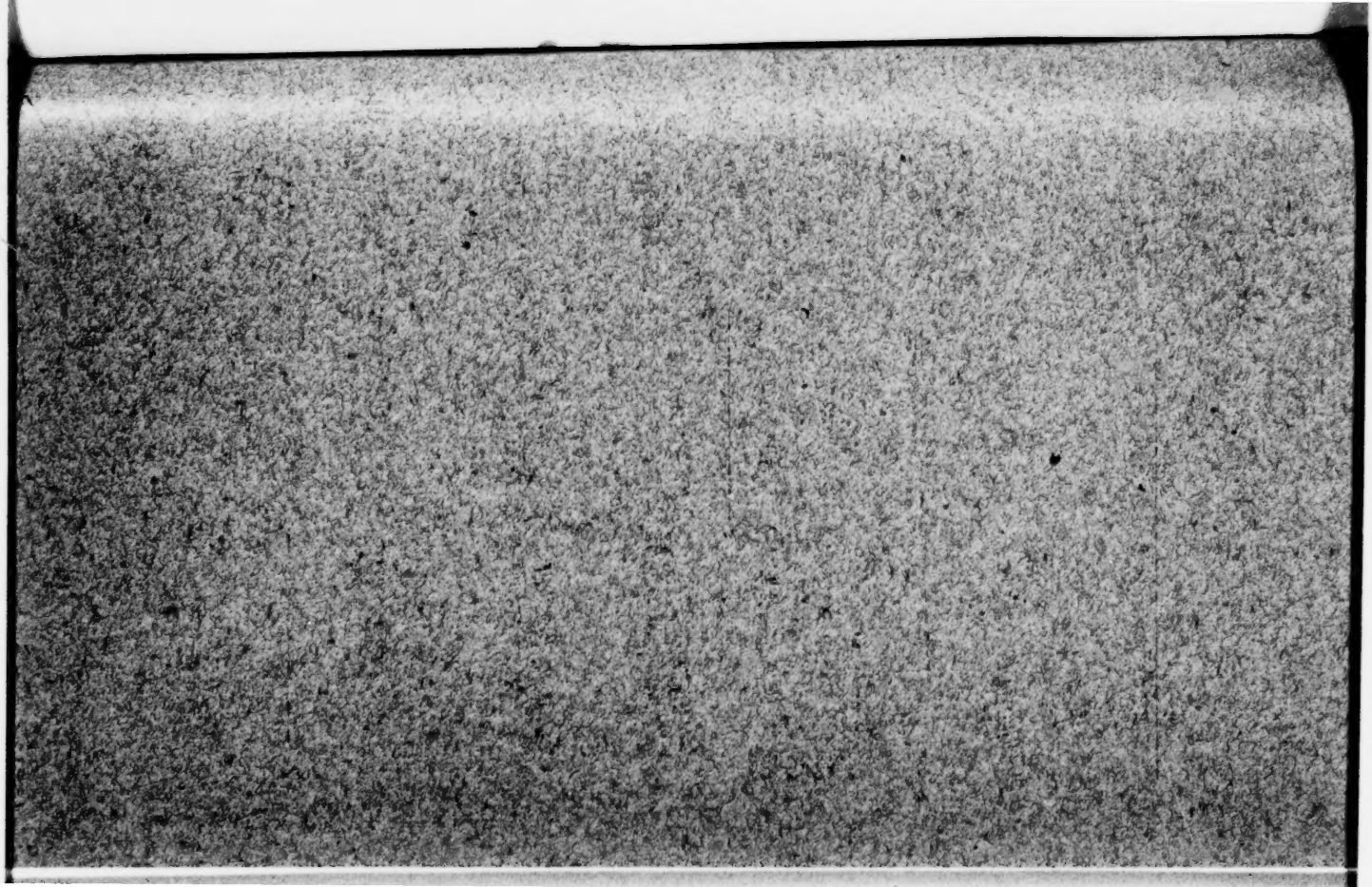

IN THE

Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

AGAINST

THE CITY OF MOBILE, a Municipal Corporation,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR, IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS OR CONFIRM THE JUDGMENT OF THE SUPREME COURT OF ALABAMA HERETOFORE ENTERED HEREIN.

This was an action of ejectment, brought to recover certain lands, referred to in the complaint, and the possession thereof, being lands on the Mobile River and assumed to be in the City of Mobile.

The plaintiff below claimed to recover by virtue of its alleged ownership of the lands in question, under certain acts of the Legislature of the State of Alabama, passed in 1867 and 1896, whereby the State assumed to grant to the City of Mobile the shore and the soil under the Mobile River. It claimed that said lands were within the boundaries of the

State of Alabama, when it was admitted into the Union, in December, 1819, and that the title to all lands, including those in question which were in the United States, within the territory embraced in the State of Alabama, became vested in that State, upon its admission into the Union.

The defendant below and the plaintiff in error, upon the trial in the trial Court, offered evidence to prove that it owned the lands in question in fee simple; that the title of their grantors or assignors was derived from a Spanish grant, made to Joseph Gaspar Munora, in March, 1792. Evidence was also offered to show the occupation by Bernoudy, the grantee of Munora, and the habitation and cultivation of the lands by him, at least as early as 1809. Evidence was also offered to show a chain of record title from the said Bernoudy, without a break, into the plaintiff in error. The evidence offered, therefore, showed, or tended to show, that the real ownership of the lands in question was in the assignees or successors of Bernoudy, at the time when the State of Alabama was admitted into the Union.

Alabama became a State, by resolution of Congress, December 14, 1819. A treaty was made between the United States and Spain on February 22, 1819, which contained the following provision:

"All the grants of lands made before the 24th day "of January, 1818, by his Catholic Majesty or his "lawful authorities, in said territories ceded by his "Majesty to the United States, shall be ratified and "confirmed to the persons in the possession of the "lands, to the same extent that the same grants "would be valid if the territory had remained under "the dominion of his Catholic Majesty."

The evidence offered on the part of the plaintiff in error shows that the claim of Regis Bernoudy to these lands, founded on the conveyance made to him by Joseph Gaspar Munora, was presented to the Land Commissioners of the

United States; that, after examination, they reported that the claim of Bernoudy should be confirmed.

These Land Commissioners were appointed by the Act of Congress of the 25th day of April, 1812, and their report was confirmed under the Act of March 3, 1819, and finally adjusted by the Act of Congress of May 8, 1822. These proceedings constituted a recognition of Bernoudy's title derived through the grant of the Spanish Government, and also in accordance with the provisions of the Treaty of 1819.

It is contended by the plaintiff in error that the title to these lands was in Bernoudy, or his assignees, prior to and at the time that Alabama became a State, and that the United States Government, at that time, did not have the ownership of these lands, and it could not pass from the United States to the State of Alabama. Subsequent to this, in 1836, a formal patent was issued by the United States, signed by Andrew Jackson, President, by his secretary, which patent recites the material facts on which Regis Bernoudy's title was established, including the Acts of 1819 and 1822, aforesaid. This was merely a recognition and confirmation of the title of the property in question, originally granted in 1792 by the Spanish Government, and preserved by actual occupation and use and by the Treaty of 1819.

In Pollard's Heirs *v.* Kibbe, 14 Peters, 353, it was held that claims granted by the Spanish authorities, though the titles may have been incomplete, came under the examination of the Commissioners appointed by the Act of Congress of the 25th day of April, 1812, and were not beyond the power of Congress to confirm, though such confirmation was subsequent to the admission of the State of Alabama into the Union.

The case further held (p. 383) that the Acts of 1819 and 1822, being founded on the reports of the Commissioners, made in 1816 and 1820, must be taken with reference thereto and as recognizing the claims

therein reported as valid, to be complete titles, by their intrinsic effect.

The plaintiff in error, therefore, claims that the title of Bernoudy, by the proceedings aforesaid, is beyond dispute. The questions with reference thereto, calling in question these Acts of Congress, the Treaty with Spain and the patent of the United States, are Federal questions, and there is absolutely no doubt but what this Court has jurisdiction (Mobile *v.* Eslava, 16 Peters, 234; Mobile *v.* Hallett, 16 Peters, 261).

The plaintiff in error, therefore, makes, as a preliminary point, that the defendant in error shows no color of right to a dismissal, and that, therefore, under a well established rule the motion to affirm should not be entertained (Davies *v.* Corbin, 113 U. S., p. 687).

The defendant in error contends that the law is so thoroughly established, in this Court, that this appeal must be classed as frivolous, and therefore the Court may affirm the judgment of the Court of Alabama; but, in all our examination of the cases, in which similar questions have arisen, we have not found any cases where the title originated by grants made prior to the treaty of St. Ildefonso, of October 1, 1800; consequently, the present case is different, in that respect, from Pollard *v.* Hagan, 3 How., 212, and the other cases cited on page 11 of the brief of the defendant in error.

The case at bar, therefore, depends upon facts not heretofore passed upon by this Court, but which, under the reasoning of this Court in the cases already cited, would confirm the title of the plaintiff in error, as we think.

In addition to what has been said, the following will give a further idea of the questions involved in this case, and it must appear that the questions presented are such as this Court has jurisdiction over, and that they are serious and important questions which cannot be disposed of on a plea that

this is a frivolous appeal, but that there should be opportunity to argue it on the merits.

(For the facts herein referred to, see Certificate of the Chief Justice of the Supreme Court of Alabama, which is a part of the record, no printed case having been made by the moving party to which we can refer, at the time of writing this memorandum.)

Counsel for the defendant in error in his statement of the case, in his brief, states the nature of the action, and the special law under which the alleged title of the City of Mobile is derived from the State. He alleges that by the Act of Alabama, approved January 31, 1867, and set out at length on page 2 of his brief, the shore and soil under Mobile River was granted to the City of Mobile; and the complaint, shown in the record, alleges that plaintiff in error unlawfully entered into possession of a lot of land extending along the channel of Mobile River, some seven hundred and thirty feet, and shoreward into a tract of land, which is called in the complaint "the Bernoudy Tract," four hundred feet. Said counsel fails, however, to state that the record shows that there was absolutely no evidence whatsoever introduced at the trial of the cause, showing whereabouts along the city's front, as defined in said Act of 1867, were these lands; absolutely no evidence whatsoever that any part of the described land was "under Mobile River"; absolutely no evidence whatsoever that the high water mark on the land sued for was eleven hundred and fifty-six feet east of Water street; absolutely no evidence whatsoever that there is any regular tide in Mobile River, at the point in controversy, due to the attraction of the sun and moon; and absolutely no evidence whatsoever as to the whereabouts the Bernoudy Tract is located along Mobile River.

Counsel also neglects to state that all evidence offered by the plaintiff in error to show that the lands in its possession were held by it in fee simple under mesne conveyances from the assignees of the grantee of a Spanish grant made in 1792 by the

Spanish authorities, was excluded; that all offers of evidence that plaintiff in error and those under whom it claimed had occupied these lands openly, notoriously, adversely and continuously, under a claim of right, more than twenty years before the bringing of the suit by the defendant in error, were excluded; that all offers of proof of the valuable improvements made by plaintiff in error upon said lands, more than three years before the bringing of the suit, had been wholly excluded.

It is this state of the record which gives rise to the Federal questions certified to by the Chief Justice of Alabama, as presented by it in this cause, and which are additional to the three Federal questions admitted by the defendant in error, in his brief, to exist in this case, and which involve the questions of the violation of Section 10, Article 1, and of the 14th Amendment to the Constitution of the United States. Counsel for the movant in this case distinctly admits in his brief, on pages 4 and 5, that there are three Federal questions, at least, involved in this appeal, viz.: 1. Whether the State of Alabama obtained a title to the shore and soil under the Mobile River by virtue of the compact under which Alabama became a part of the Union. 2. As to the effect of the patent from the United States, offered in evidence in this case, but excluded by the trial Court, and which exclusion was sustained by the Supreme Court of Alabama. 3. Whether the Act of the General Assembly of Alabama, approved January 31, 1867, as construed by the Supreme Court of Alabama, is or not an interference with commerce.

In this statement, the movant's counsel ignores the other Federal questions distinctly raised by the record, hereinbefore set out, and as shown by the certificate of Chief Justice McClellan of Alabama, viz.: The violation of the provisions of Section 10, Article 1, of the Constitution of the United States; and, also, the violation of the 14th amendment to said Constitution.

It seems, therefore, to plaintiff in error, that, upon this admission of counsel made in his brief, and because of his ignoring absolutely the other Federal questions shown by the record, and certified to by the Chief Justice of Alabama, this motion should be denied upon the authority of Blythe *v.* Hinckley, decided by this Court February 25, 1901, 180 U. S., p. 333.

Inspection of the record in this case shows, also, that the writ of error was not sued out for delay or for a frivolous cause. Nothing less than the title to the entire shore front of Mobile River, on both sides, for a length of about six miles, including the river front of the present City of Mobile, is involved in this case.

Such inspection will show that plaintiff in error was deprived by the judgment of the Supreme Court of Alabama of a body of land bordering upon Mobile River, more than two and a half acres in length, in front, with a depth of nearly two acres, without a scintilla of evidence introduced at the trial on behalf of the defendant in error, showing that this land sued for was actually under the navigable waters of Mobile River. Such inspection will also show that no evidence was allowed to be introduced by the plaintiff in error at such trial, and that all the evidence of plaintiff in error was excluded upon objection by the defendant in error.

The pertinency of this remark is evident when it is recalled that Spanish grants lying within the limits of the City of Mobile may go to the channel of Mobile River, and have so been held to extend.

Hagan *v.* Campbell, 8 Porter, 9.
Hallett *v.* Hunt, 7 Ala., 905.

The patent and field notes in this case showed that the original Spanish grant, offered in evidence, was bounded by the river, and yet they were excluded as immaterial and irrelevant by the trial

Court, and the Supreme Court of Alabama affirmed that action of the trial Court.

It is settled law in Alabama that the Spanish crown had complete property in Alabama in tide waters, and could vest such rights in a grantee.

Mobile *v.* Eslava, 9 Porter, 592–595.

It was said in Innerarity *v.* Mims, 1 Ala., 660, decided in 1840: "Where possession of land was acquired, within the limits of the territory claimed by the United States, by virtue of the treaties of St. Ildefonso and Paris, whilst Spain exercised *actual* dominion over it, under the defense of the Statute of Limitations, the possession of land will be dated from the period of its actual occurrence, and not from the date of the Act of Congress of 1812, abrogating the Spanish, and extending the laws of the Mississippi territory over the country, nor from the date of the actual occupation of the territory by the United States, the succeeding year."

This case is cited in Eslava *v.* Farmer, 7 Ala., 555, decided in 1845. It was also said in the latter case (Eslava *v.* Farmer) that it is "quite unimportant whether the title of the United States rests upon the cession made by the Treaty of Paris, or by that made with Spain in 1819, by which the Floridas were acquired, as in both this Government came under the same obligations to respect the rights of private property. Such would have been the law if the treaty had contained no such provisions or if the country had been acquired by conquest (Perchieman's case, 7 Peters, 51; Strother *v.* Lucas, 12 Peters, 438, and Innerrarity *v.* Byrne, 1 Ala. Rep., 672)."

It was clearly competent for Spain, whilst it continued in possession of this country, to make the grant offered in evidence in this case.

Hallett *v.* Hunt, 7 Ala., 882, 897–899.

Pollard *v.* Files, 2 How., 991.

The evidence offered by the plaintiff in error, but excluded by the Court below, showed that Regis Bernoudy claimed the land under a Spanish grant or concession made March 3, 1792, or when the country was unquestionably in the possession of Spain, and, therefore, within the provisions of the Treaty of 1819, according to the authorities hereinbefore cited.

Under the act approved December 4, 1812, Laws of Alabama (Toulmin's Digest), page 248, entitled "An Act making further regulations in judicial proceedings," it was provided, "That all certificates issued in pursuance of any act of Congress, by any of the boards of commissioners, register of a land office, or any other person duly authorized to issue such certificate upon any warrant, or order of survey, or to any donation or pre-emption claimants, for any lands in this territory, shall be taken and received as vesting a full, complete and legal title in the person in whose favor the said certificate is granted, to the lands therein mentioned, and his, her or their assigns so far as to enable the holder of such certificate to maintain any action thereon, and the same shall be received in evidence as such in any court of this territory." This act is cited in the opinion in the case of Hallett *v.* Eslava, 2 Stew., 118; and Hallett *v.* Eslava, 3 Stew. & Port., 126.

Riparian Rights.

It was said in Miller *v.* Cullum, 4 Alabama, 582, decided in 1843: "But suppose the Spanish concession *in totidem verbis* had recognized the mouth of the branch, as the northeast corner of the tract at the time it was surveyed, would it not be admissible to show, that owing to alluvial deposits and other causes, the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot?"

In Hagan *v.* Campbell, 8 Porter, 33, it is said: "Nor can the fact of a road running along the bank of a navigable river, be held to limit a grant having the river for its boundary, so as to exclude its proprietor from riparian rights; and in this case there cannot be the slightest pretense for such an idea. The freehold in the land over which the road runs, did not continue in the Spanish Government; that was transferred by the grant, while its use only was to be enjoyed by the public (Cortelyou *vs.* Van Brundt, 2 Johns. R., 351). And the title to all the soil lying between the original tract and the river, having passed by virtue of the grant of 1807, to John Forbes & Co., and of course to his assignees, they immediately became entitled to the right to alluvial formations, in the same manner as other riparian proprietors are, on navigable streams.

But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

This doctrine is reaffirmed in Hallett *v.* Hunt, 7 Ala., 882.

In Hagan *v.* Campbell, 8 Porter, 9, it is said that "Riparian proprietors are entitled to all accessions made, to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand, or other substances."

"Where the term 'river' is used in a grant, as a boundary—high or low water mark must be intended—not a middle point."

"A plat or plan of survey may be referred to in a grant, and become part of it, showing the proper lines, and ascertaining the locality."

In this case, the grant referred to was dated at Pensacola, the 25th day of September, 1807, and was made by the intendant of the province of West Florida; and that in 1774 Pantan, Leslie & Co. purchased of William Richardson the tract embraced by the British grant, and John Forbes, a partner of

said firm, by his memorial to the tribunal of the intendancy of West Florida, asked a confirmation of his title. The grant, after reciting the reference of the memorial and its accompanying documents, to the appropriate officers of the Spanish Government, and their action thereon, made a declaration shown on page 14 of said report.

Referring to this Spanish grant the Supreme Court of Alabama say: "Here is a clear grant of all the soil lying between the tract first granted and the river, designated upon the plat or plan of survey accompanying the Spanish grant. Where the term 'river' is used as a boundary, either high or low-water mark must always be intended, and not some middle point. The land embraced by the British grant is 'terminated by the bank of said river (Mobile) on the east side'; by the 'east side,' we are to understand the eastern boundary of the tract, and not the eastern margin of the river. It is, then, clear beyond controversy, that the grant of 1767, extended to the river, which, as already shown, was high-water mark" (p. 28).

These rulings of the Supreme Court of Alabama are certainly ancient enough to have created a right of property which will be respected, and the right obtained thereunder protected, by this Court, even if the Supreme Court of Alabama afterwards should appear to intimate to the contrary, as was done in this case, wherein the Court sustained the refusal to give the charge requested by the plaintiff in error, limiting the recovery of the defendant in error to such shore and soil as was under the waters of the river in 1897, the time of the bringing of the suit. The Supreme Court of Alabama sustained the refusal to give this charge on the ground that the defendant in error is entitled to all the lands extending back to high water, if such there was, in 1867, the date of the act under which defendant in error claims, and this without regard as to whether or not

there were any secretions and alluvion made, changing that line, since 1867.

Morgan *v.* Curtinius, 20 How., 1.
Wade *v.* Travis Co., 174 U. S., 499.

This right to alluvion is a vested right, of which the plaintiff in error cannot be deprived without compensation. A right vested is a contract executed, and a statute impairing a vested right impairs the obligation of a contract.

New Jersey *v.* Wilson, 8 Cranch, 164;
6 Cranch, 131.

The rights of riparian owners in Mobile to the wharves in front of their lands abutting on the river is clearly recognized in Boulo *v.* New Orleans, Mobile & Texas Railroad Co., 55 Ala , 480, wherein the opinion was delivered by Chief Justice Brickell, who says: "The place in controversy is a slip between two wharves, the one on the north known as 'Church Street Wharf'; the one on the south as 'Hogan's Wharf'; its western boundary is Commerce street, from which it is separated by a bulkhead or barrier; and on the east it extends into the Mobile River. Whether the whole slip is not, at high tide, covered by the water of the river, is a fact about which the evidence conflicts. We incline to the opinion that, immediately at the barrier, or bulkhead, land has been formed, which is not usually covered by water at high tide. Originally, Commerce street, at this place, was covered by high tides, if not at all times; and the water extended to, if not beyond, the storehouse of the complainants, on the western side of the street. The municipal authorities of the City of Mobile gradually reclaimed the land now forming the street, and the labor of proprietors, asserting riparian rights, and exercising them in the constructions of wharves into the river, on the east side of the street, contributed."

In the case of Kennedy *v.* Bebee, 8 Ala., 909, the defendants were in possession of a lot, part of Fort

Charlotte. The statement of the case, as reported by the Judges themselves, shows that "the line of the fort lots were extended east, below high water mark, but since their sale Water street has been laid off east of them, and the land reclaimed by art; and between this street and the channel of the river, and *in front of the lot of which the defendants are proprietors, the land in controversy is located.*"

"The plaintiff prayed the Court to charge the jury, 1. That he was entitled to all the land lying between the eastern survey of Dinsmoor and the river, according to the evidence adduced. 2. That he was entitled to the land embraced by the patent from the United States to his lessor, which was not contained in the grant to the lot company, and *that the limits of these lots could not be extended by improvements made by riparian proprietors.*"

"These several prayers for instructions were denied, and the Court charged the jury that the case of Abbot's Exr. *v.* Doe *ex dem.* Kennedy, 5 Ala. Rep., 393, was a decisive authority against the plaintiff's right to recover. A verdict was returned for the defendants, and judgment rendered accordingly."

The statement by the Judges further shows that "It was conceded that if the Fort Charlotte lots had been bounded by the river, that the defendants would have had riparian rights, and their counsel insisted that an extension of their lines below high-water mark could not make a different rule of law applicable."

The judgment of the Circuit Court was affirmed.

Abbot *v.* Kennedy, 5 Ala., 393, is another Mobile case distinctly recognizing the riparian rights of owners of land on Mobile River in the City of Mobile.

The statement of the case by the Judges shows that "he (defendant) called many witnesses, who testified that at the time of the sale of the Fort Charlotte lots high water extended over the eastern

limits of the lots conveyed by the defendant's patents; *and further*, that the land now in controversy was reclaimed from the water and *filled up by the defendant's testator, or those under whom he mediately or immediately claimed.* The defendant deduced a title to himself to the lots described by the patents, and proved that the property in controversy was adjoining them, and *lay immediately east of them.* The Court charged the jury that if they believed the evidence, the plaintiff's title was the best."

The judgment of the Circuit Court in this case was reversed.

In this case Chief Justice Collier says, page 395: "It is a well settled principle of the common law that a person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil (New Orleans *v.* The United States, 10 Peters Rep., 717; Hagan & Campbell *v.* Cleaveland, 8 Porter's Rep., 9, and cases there cited). *Angell*, in his treatise on Tide Waters, argues to prove that it is allowable to make embankments on, or reclaim the shore, and appropriate it to private purposes where the public are not incommoded. But admits that the common, which is founded on the civil law, recognizes the State as the legal proprietor of the shore, in trust for the public, and entitled to judge whether artificial improvements will be promotive of the common right of enjoyment; and consequently may abate an intrusion as a public nuisance, or a purpresture (pp. 125, 133, 143). The inference from the law, as we have stated it, is that accretions from natural causes become the soil of the riparian proprietor, that his limits extend, or diminish, according as the water may recede or trench upon his land. The State only claims a property in the shore, as the representative of the public, for purposes entirely conservative of the usufruct therein, and never destructive of it. This be-

ing the case, it would seem necessarily to follow that the sovereign power can make no disposition of the shore, by grant or otherwise, prejudicial to the rights of those for whom it is holden in trust. This question was considered quite at length in The Mayor, &c., of Mobile *v.* Eslava (9 Porter's Rep., 577), in which it was held that, although it was competent for the King of Spain, in the exercise of his unlimited powers, to grant the shore of the navigable waters in his American possessions, yet Congress was prevented by the stipulations with Alabama from exercising such a power since its admission into the Union."

* * * * * *

"From what we have already said it results that no subsequent grant by the government can operate to divest the defendant's right to alluvion, or change his boundary by interposing another proprietor of the soil between his land and the water. The terms of the act cited forbid the idea that such an interference was contemplated" (p. 396).

In Pollard *v.* Greit, 8 Ala., 930, the statement of the case, page 933, shows that the defendant's land was made by Tankersly's filling up the marsh in 1822, between Water street and the river, at Government street, in the City of Mobile, and Tankersly's title was sustained in this case.

In Chastang *v.* Dill, 19 Ala., 421, the statement of the case shows that the plaintiffs claimed a lot of land lying between Royal street and Mobile River, and that "There was a conflict in the testimony as to the extent of the lot, some witnesses testifying that it extended to the river, and was partially covered by the water at high tides, whilst others testified that it was subject only to be reached by the water at extraordinary high tides, and that between the lot and the river, there was a low flat waste, usually wet, and some places covered with stagnant water, but elevated above ordinary high-water mark. The witnesses agreed that John Chastang had enclosed the lot with a picket fence, and

that the fence extended as far the lot could be cultivated, but that the fence did not extend to ordinary high-water mark, and most of the witnesses said that the lot sued for was not within the lines of said picket fence. It was admitted that the lot sued for was within the limits of the claim as presented to the commissioners by Barzella Chastang, and also within the limits of that claim as laid down in the official survey, the form of which is given by an exhibit to the bill of exceptions."

The verdict was for the defendant, but upon appeal this judgment was reversed.

This case shows clearly that the lot sued for was east of the fence, that the fence went as far as the low ground, and that, therefore, this lot was in lines which were either under the high tide, or was a low, flat waste, usually wet, and in some places covered with stagnant water, and the right of the plaintiff thereto was sustained.

This case shows, also, very clearly, that a very large part of the most valuable business portions of the City of Mobile is built upon lands reclaimed from the river of Mobile by private individuals, and which, according to the decision in the case at bar, are upon State lands, and the owners are liable to be ejected whenever the State chooses to convey the same by appropriate words to the City of Mobile.

In Howard *v.* Ingersoll, 17 Ala., 792, decided in 1850, it was said by Chief Justice Dargan, that "A grant, therefore, that is bounded by the shore of a fresh water river, conveys the land to the water's edge at low water."

The Mobile River is a fresh water river at the City of Mobile.

Toumey in his geology of Alabama, says (2d Biennial Report, pp. 151, 122), speaking of Mobile Bay: "The great volume of fresh water flowing into the Bay and the *very narrow* entrance, prevent the water from becoming even brackish at Mobile till late in the season, when the rivers become low."

Even supposing the Act of January 31, 1867, conveyed to the City the shore and soil under the waters of Mobile River, yet such a grant does not vest it with exclusive riparian rights, so that it has the right to oust the plaintiff in error from its riparian rights as owner of land abutting on Mobile River.

Turner *v.* The People's Ferry Co., 21 Fed. Rep., 90.

The Alabama decisions upon this subject are in harmony with those of the United States Supreme Court.

Jefferson *v.* Omaha Land Co., 134 U. S., 189.
Nebraska *v.* Iowa, 143 U. S., 359.
Shively *v.* Bowlby, 152 U. S., 35.

Statute of Limitations.

The Statute of Limitations in favor of plaintiff in error against the State began to run upon the adoption of the statute of twenty years, which was with the adoption of the Code of Alabama of 1852, about fifteen years prior to the Act of 1867; and it was not in the power of the State to deprive the plaintiff in error of the rights vested in it by virtue of such possession.

In this State it was held, as far back as in the case of Grice *v.* Jones, 1 Stewart, 254, "That when the Statute of Limitations begins to run, it continues to run notwithstanding any intervening disability to sue."

"But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

Hagan *v.* Campbell, 8 Porter, 33.

Enough has been said to show that this appeal is not frivolous, nor taken for the purpose of delay.

That the property of this plaintiff in error has been in its possession, or of its grantors, for over one hundred years, certainly entitles the plaintiff in error to ask the careful consideration of this Court to a full argument on the merits; and the serious questions herein presented ought not to be decided upon a mere motion to dismiss, especially where the jurisdiction of this Court is admitted.

We respectfully submit that this motion should be denied.

FREDERICK G. BROMBERG,
Attorney for Plaintiff in Error.

WILLIAM B. PUTNEY,
Of Counsel.

No. 62.

Bf. of Bromberg & Lewis for P. E.

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 62

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
THE CITY OF MOBILE,
Defendant in Error.

Error to the Supreme Court of Alabama.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Of Counsel for Plaintiff in Error.

C. G. Burrows, Walker and Centre Street, N. Y.

[10-4-'02]

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 274.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

vs.

THE CITY OF MOBILE,
Defendant in Error.

Error to the Supreme Court of Alabama. Brief for the Plaintiff in Error.

Statement of the Case.

In 1867, in some way, an act was procured to be passed by the Legislature of Alabama, which was approved January 31, 1867, and which appears in the Pamphlet Acts of Alabama of 1866–67 at page 307, and which is as follows, viz:

"AN ACT

Granting to the city of Mobile the riparian rights in the river front.

SECTION 1. Be it enacted by the senate and the house of representatives of the State of Alabama, in General Assembly convened, That the shore and soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined and set forth in section 2 of "An Act to incorporate the city of Mobile, approved February 2nd, 1866, be and the same is hereby granted and delivered to the city of Mobile.

SECTION 2. Be it further enacted, That the mayor, aldermen and common council of the city of Mobile, be and are hereby created and

declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

Approved January 31st, 1867."

Soon after the passage of this act an attempt was made by the authorities of the City of Mobile to interfere with the owners of all the private wharves in front of the City ; whereupon these owners filed a bill in chancery in the United States Circuit Court for the Southern District of Alabama, to enjoin the City from asserting any right or claim under said law, and from interfering with the possession, use, or profitable enjoyment of said wharf property.

A perpetual injunction was granted by the United States Circuit Court, as prayed for. From this decree an appeal was taken to this Court December 8, 1869, where said appeal was dismissed by agreement, and the mandate of this Court accordingly issued directed to the said Circuit Court, October 30, 1874. The decree thus affirmed by this Court finds as follows :

" 1. It appears to the Court that under titles derived from the United States, under Acts of Congress for the settlement of land claims in the districts of land in which the City of Mobile was included and originating in concession by the French, British or Spanish Government, or under Acts of Congress for the sale or transfer of lots in Mobile, the west bank of the river Mobile, within the corporate limits of Mobile, is vested in individuals and also an important portion of the river front to the channel of the river is held by those titles.

2. That from the establishment of Mobile as a port of entry there has been a custom for the riparian owners to erect wharves in front of their lands and to collect wharfage for the use of the same. That the improvements for this purpose have tended to ameliorate the sanitary condition of the City, extend facilities to commerce and have proved a public benefit. That these improvements have been recognized and sanctioned in the laws of the State and the ordinances and administration of the City government and that a large amount of capital has been invested in the same which has been subject to taxation and borne city charges, and they have been constantly regarded as private property, and at no time a hindrance to the public right of navigation, or have been deemed to be a nuisance.

3. That the corporate authorities of the City of Mobile, are not

authorized by their charter, nor anything contained in the Act approved the 31st January 1867 by the body calling itself the "General Assembly" which purports to grant the shore and soil of the river Mobile to the City, and certain powers to the corporate authorities, nor by the authority of that act to declare the wharves to be free and open to the public, or an infringement of public rights, nor to impede, obstruct or prevent the collection of wharfage by the proprietors of the same or to prevent the use of the same as private property in lawful ownership.

* * * * * * *

5. That the plaintiffs to the bill, and persons made defendants therein with similar interests are entitled to the relief prayed for, and to be quieted in their title."

Leverich vs. City of Mobile, S. C. U. S. Oct. Term, 1874, No. 2.

This decree was respected and no further action taken under said act of January 31, 1867, until December 14, 1896, more than twenty years after the affirmance by this Court of the above described decree of the United States Circuit Court. Then a complaint was filed against plaintiff in error, in the Circuit Court of Alabama for Mobile County, in the name of the City of Mobile as plaintiff.

This complaint was in the form prescribed by the Code of Alabama for ejectment.

The description of the land sued for states that it is a part of the middle division of the Bernoudy Tract, having seven hundred and thirty feet front along the channel line of Mobile River, and extending shorewards nearly two acres. (Trans. pp. 26 & 27.)

By the Statute of Alabama the defendant in ejectment has a right to demand of the plaintiff an abstract in writing of the title or titles on which he will rely for a recovery, and the plaintiff is confined to the proof of such title or titles.

Code of Alabama, 1886, sec. 2697. (In force at the time of trial).

Under this statute plaintiff in error demanded an abstract of the City's title to the land sued for: Having reference to the abstract thus furnished the plaintiff in error by the City, plaintiff in error filed six special pleas, setting forth the title of the defendant in error and showing it was based entirely upon the act of January 31, 1867. (Trans. pp. 30 to 33).

These pleas were stricken out on motion of the City. (Trans. pp. 33 to 34).

The plaintiff in error then suggested on the record its adverse possession of the lands sued for, for more than three years, in accordance with the provisions of the Code of Alabama, 1886, section 2702. (Trans. p. 34).

And also demurred to the complaint :

" 1st. Because the lands sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State."

These demurrers were overruled, (Trans. pp. 35, 36), and the plaintiff in error then pleaded " not guilty". All subsequent proceedings are shown in the bill of exceptions. (Trans. page 41, *et seq.*)

At the trial the City introduced as evidence in its behalf the Act of Congress to enable the people of Alabama Territory to form a State government :

The ordinance of Alabama, August 2, 1819, ordaining, amongst other things, " That all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State : and this ordinance is hereby declared irrevocable, without the consent of the United States ".

Also, the resolution of Congress declaring the admission of the State of Alabama into the Union, December 14, 1819 :

The act of the Legislature of Alabama of January 31, 1867, above set forth :

The act of February 18, 1892, entitled " An act to fix the right of the city of Mobile to certain real estate : Also, an act amending this act :

Also, the charter of the city, referred to in the act of January 31, 1867, and then rested. (Trans. p. 45).

No witness was examined by the defendant in error during the trial, in its behalf.

When the defendant in error offered in evidence the act of January 31, 1867, the plaintiff in error objected to its introduction as evidence before the jury, upon the following grounds, among others :

" 3. Because the act is void as being *ultra vires*, because the

State is a trustee of the shore and soil under the Mobile River, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river and extends to the water line at low water.

Because accretions belong to the riparian owner.

6. Because the plaintiff is no longer in existence; because its existence was terminated by the act to provide a charter for the city of Mobile, approved February 6, 1897, p. 542 Pamph. Acts of Ala. 1896–'7.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitations of twenty years.

8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act". (Trans. pp. 44, 45).

The Court overruled these objections, and admitted the act as evidence before the jury, to which ruling of the Court the plaintiff in error excepted.

Plaintiff in error offered in evidence so much of volume three of the American State Papers "in relation to the public lands" as forms part of the "Register of claims to lands in the district east of Pearl River, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident", and relates to the claim of Regis Bernoudy, numbered "11", on page 30 of said printed volume. And also offered in evidence so much of said volume three of the American State Papers "in relation to the public lands" as appears on pages 400, 401,

and 402, of said volume, as report numbered "9", "Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

The plaintiff in error also offered in evidence the treaty of 1819 between the United States and Spain, as printed in the United States Statutes at Large, in the volume entitled "Revised Statutes of the United States relating to the District of Columbia, Post-roads, and Public Treaties", 43rd. Congress, 1873-1875, at pages 712 to 718, inclusive: Also, specially, article VIII of said treaty on page 714:

Also, the patent of the United States to George Poe and William H. Robertson, the assignees of Regis Bernoudy, the claimant referred to in 3rd. American State Papers:

The field notes upon which the patent is based:

And a series of deeds of conveyance and wills, constituting the chain of title of the plaintiff in error from the Spanish claimant down to the plaintiff in error. (Trans. pp. 46 to 89, inclusive): Each of which was excluded by the Court upon objection of the defendant in error, as immaterial and irrelevant.

The plaintiff in error afterward offered all of the foregoing evidence again, *seriatim*, for the purpose of showing color of title in plaintiff in error to the lands sued for.

The Court again, upon objection of the defendant in error, excluded this evidence as immaterial and irrelevant for that purpose. (Trans. p. 75).

The plaintiff in error then offered evidence to show that it, and those under whom it derived title, had been assessed by the City as the owners of this land, and paid taxes to the City for it from 1867 down to and including the year of trial.

The Court excluded this evidence, upon objection of the defendant in error, as immaterial and irrelevant. (Trans. pp. 69, 70 and 80 to 86).

The plaintiff in error proved that its grantor, Mary E. Barnewall, was one of Jonathan Emanuel's heirs, and that the property conveyed to her by plaintiff in error was derived by her from her said father.

The Court, however, excluded all evidence offered by the plaintiff in error to show improvements made upon said lands by driving pilings in front of it. (Trans. p. 71).

And all offers of evidence by the plaintiff in error to show ad-

verse possession of the lands described in the complaint, notoriously, continuously, adversely and under color of right for twenty years before the bringing of this suit, were rejected by the Court. (Trans. p. 72).

The City Engineer was put upon the stand by the plaintiff in error (Trans. p. 73), and the question put to him, viz., "State is there such a thing known on the river front as a fixed high-water mark line on the lands sued for ".

The question was excluded, upon objection of the defendant in error, as immaterial and irrelevant.

All questions of the plaintiff in error tending to elicit from the witness the fact that there was piling and wharves in front of the lands, and grading for a railroad track upon this land, and improvements upon the land, were also excluded as immaterial and irrelevant. (Trans. p. 74).

All questions by plaintiff in error tending to elicit evidence to show improvements made upon this land more than three years before the bringing of this suit were excluded as immaterial and irrelevant. (Trans. p. 75).

To all the adverse rulings of the Court the plaintiff in error duly reserved exceptions.

At the request of the defendant in error the Court gave the general charge, and refused charges requested by the plaintiff in error, as shown more particularly in the assignments of error hereinafter set forth.

The Supreme Court of Alabama affirmed every ruling of the trial Court.

Specification of Errors.

The Supreme Court of Alabama erred in affirming the judgments of the Circuit Court of Mobile County in rendering the judgment, viz:

1. " That the plaintiff have and recover of the defendant the following tract of land described in the complaint as follows, viz., situated in the city and county of Mobile and state of Alabama, and more particularly described as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of

Water street, measured on said boundary line, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River Commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water Street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, together with the sum of sixty-five dollars ($65.00) for the detention thereof, as so assessed by the jury, together with the costs in this behalf expended, for which let execution issue for said lands, together with the sum of sixty-five ($65.00) dollars for the detention thereof and all costs". (Trans. pp. 3, 37 and 38).

2. In overruling the demurrer of the plaintiff in error to the complaint, viz., " Because the lands sued for are under the ebb and flow of the tide ". (Trans. pp. 4, 35 and 36).

3. In overruling the demurrer of the plaintiff in error to the complaint, viz: " Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide ". (Trans. pp. 4, 35 and 36).

4. In overruling the demurrer of plaintiff in error to the complaint, viz: " Because this suit is for soil under the navigable waters of this State ". (Trans. pp. 4, 35 and 36).

5. In overruling the demurrer of plaintiff in error to the complaint, viz: " Because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment ". (Trans. pp. 4, 35 and 36).

6. In overruling the objection of plaintiff in error to the admission in evidence of the Act of the General Assembly of Alabama, approved January 31, 1867, entitled " An act granting to the City of Mobile the riparian rights in the river front ", as found in Pamph. Acts of Alabama, 1866–67, page 307, and in admitting the same in evidence. (Trans. pp. 4, 44 and 45).

7. In overruling plaintiff in error's objection to the admission of said Act of January 31, 1867, upon the ground that "the act is void as being *ultra vires*, because the State is a trustee for the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts" and in admitting the same in evidence. (Trans. pp. 4, 44 and 45).

8. In overruling plaintiff in error's objection to the introduction in evidence of said Act of January 31, 1867, and in admitting the same in evidence, "because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river, and extends to the water line at low water.

Because accretions belong to the riparian owner." (Trans. pp. 4, 44 and 45).

9. In overruling the objection of the plaintiff in error to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the plaintiff is no longer in existence, because its existence was terminated by the act approved February 6, 1897, page 542 of the Pamph. Acts of Alabama of 1896–97." (Trans. pp. 4, 44 and 45).

10. In overruling the objection of plaintiff in error to the introduction of said act of January 31, 1867, and in admitting the same in evidence, "because the act shows on its face that plaintiff is barred by the statute of limitation of twenty years." (Trans. pp. 5, 44 and 45).

11. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the act does not give the city of Mobile any right of possession." (Trans. pp. 5, 44 and 45).

12. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to said city of Mobile only the

shore and soil under Mobile river, within the boundary lines of the city of Mobile." (Trans. pp. 5, 44 and 45).

13. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act". (Trans. pp. 5, 45).

14. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because said act does not show that the State had any right of possession to the shore and soil under Mobile river, described in said act, at the time of the passage of said act". (Trans. pp. 5 and 45).

15. In overruling the plaintiff in error's objection to the introduction in evidence of the act to incorporate the city of Mobile found in the Acts of Alabama of 1866, page 202, being the act referred to in the act just preceding offered, giving the limits of the city, and in admitting the same in evidence. (Trans. pp. 5, 45).

16. In overruling the plaintiff in error's objection to the introduction in evidence of the act approved February 18, 1895, to be found in the acts of the General Assembly of Alabama of 1894-95 page 115, entitled "An act to fix the right of the city of Mobile to certain real estate" and in admitting the same in evidence. (Trans. pp. 5, 45.)

17. In overruling the plaintiff in error's objection to the introduction in evidence of the act found in the Acts of the General Assembly of Alabama of 1896-97, page 50, entitled "An act to amend an act entitled 'An act to fix the rights of the city of Mobile in certain real estate, approved February 18, 1895,'" and in admitting the same in evidence. (Trans. pp. 5, 6 and 45).

18. In sustaining the defendant in error's objection to and in excluding from evidence "so much of volume 3 of the American State papers in relation to the public lands as forms part of the registry of claims to lands in the district east of Pearl river, in

Louisiana, founded on private conveyances, etc., as relates to the claim of Regis Bernoudy, numbered 11, on page 30 of said printed volume." (Trans. pp. 6, 45.)

19. In sustaining the defendant in error's objection to and in excluding from evidence "so much of said volume 3 of the American State papers in relation to the public lands as appears on pages 400, 401, and 402 of said volume, as report number 9, 'Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, etc.'" (Trans. pp. 6, 46 & 47).

20. In sustaining the defendant in error's objection to and in excluding from evidence both of said reports referred to above when offered to show color of title. (Trans. pp. 6, and 75).

21. In sustaining the defendant in error's objection to and in excluding from evidence the treaty of 1819 between the United States and Spain as printed in the United States Statutes at Large in the volume entitled "Revised Statutes of the United States Relating to the District of Columbia, Post-roads, and Public Treaties", Forty-third Congress, 1873–'75, at pages 712 to 718. (Trans. pp. 6, & 47).

22. In sustaining the defendant in error's objection to and in excluding from evidence article VIII. of said treaty, on page 714 of said volume, specially offered by the plaintiff in error. (Trans. pp. 6, 47).

23. In sustaining the defendant in error's objection to and in excluding from evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignees of Regis Bernoudy, for section thirty-eight, in township four south, range one west, containing five hundred and seven acres and seventy-six hundredths acres, in the district of land subject to sale at St. Stephens, Alabama, dated the 28th of December, 1836. (Trans., pp. 6, 47 & 48).

24. In sustaining the defendant in error's objection to and in excluding from evidence the field notes entitled "Com'r. rt. No. 10, claim No. 11, sec. 38, township 4 south, range No. 1 west, St.

Stephens land district of Alabama". (Trans. pp. 6, 7, 48 & 49 & 50).

25. In sustaining the defendant in error's objection to and in cluding from evidence the copy of the tax-lists of the city of Mob from 1867 down to and including 1878, being Exhibit "B" to bill of exceptions. (Trans, pp. 7, 69, 70, 80 and 81).

26. In sustaining the defendant in error's objection to and excluding from evidence the tax-lists of the port of Mobile and of Mobile from 1879 down to and including 1897, Exhibit " to the bill of exceptions. (Trans. pp. 7, 70, 82, 83 & 84.)

27. In sustaining the defendant in error's objection to and in cluding from evidence the receipts and tax bills of the city of Mo for the years 1894, '95, '96 and '97, Exhibits "D", "E", "F", 'G" to the bill of exceptions. (Trans. pp. 7, 70 & 71, 84, 85, 8 87).

28. In sustaining the defendant in error's objection to and in cluding from evidence any testimony whatever in regard to the p ment of taxes to the city of Mobile offered by the plaintiff in er (Trans. pp. 7, 70 & 71).

29. In sustaining the defendant in error's objection to and in cluding the plaintiff in error's question to the witness William Ba wall, viz: "Did you ever have charge and control of said lands (Trans. pp. 7. & 71).

30. In sustaining the defendant in error's objection to and excluding from evidence the plaintiff in error's question to witness, Barnewall, viz.: "Did you or not ever drive piling in f of this land which is marked 'Emanuel est.,' being the same sol the transportation company by your wife?" (Trans. pp. 7 & 71

31. In sustaining the defendant in error's objection to and excluding the plaintiff in error's question to the said witness, v "When was it you drove those pilings?" (Trans. pp. 7 & 71).

32, In sustaining the defendant in error's objection to and excluding the plaintiff in error's question to the said witness, v "Did you or not pay taxes on the lands that were sold by

wife to the Mobile Transportation Company ?" (Trans. pp. 7 & 71).

33. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the said witness, viz. : " Look at the copy of the tax-list, Exhibit " B ", and state whether or not the land described in there," etc., " was the land sold to the Transportation company by witness's wife." (Trans. pp. 8, 71 & 72).

34. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz. : " Whether or not the property assessed in Exhibit " C " to Mary E. Barnewall is the same property sold by her to the Transportation company." (Trans. pp. 8, 72).

35. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's offer of the oral evidence of Mr. Barnewall, John Hogan, and others tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right, for twenty years before the bringing of this suit (Trans. pp. 8, and 72).

36. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the witness D. M. N. Ross, viz : " Please examine the field-notes from the office of the secretary of state at Montgomery, Alabama, as shown by the copy made April 27, 1894, of section 38, township 4 south, range 1 west, St. Stephen's land district of Alabama, and state whether or not the land just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south and north boundaries are concerned ". (Trans. pp. 8, 72 & 73).

37. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz : " State is there such a thing known on the river front as a fixed high-water-mark line on the land sued for " (Trans. pp. 8, & 73).

38. In sustaining the defendant in error's objection to and in excluding the answer of said witness, viz : " I know the ballast was valuable for filling in ". (Trans. pp. 8, & 73).

39. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Whether there has been any filling done on the property marked on the map 'Emanuel estate'". (Trans. pp. 8, & 73).

40. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "How long did you first notice any filling upon the part marked 'Emanuel'?" (Trans. pp. 8, 9 & 73).

41. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "Whereabouts did Barnewall drive piling in front of the Emanuel part?" (Trans. pp. 9, 73 & 74).

42. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Are there or not wharves in front of this land described in the complaint?" (Trans. pp. 9, & 74).

43. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Is there not the bed of a railroad track—is there not the grading of a railroad track upon this land described in the complaint?" (Trans. pp. 9, & 74).

44. In sustaining the defendant in error's objection to and in excluding plaintiff in error's question to said witness, viz: "How long ago was that grading for a railroad track built?" (Trans. pp. 9, & 74).

45. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the witness John Hogan, viz: "Did you ever make any improvements on that marked 'John Hogan'?" (Trans. pp. 9, & 74).

46. In sustaining the defendant in error's objection to and in excluding plaintiff in error's question to said witness, Hogan, viz: If he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map (Trans. pp. 9 & 74).

47. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the said witness, Hogan, viz: "What is the value of the improvements made by you upon the portion of the land lying east of the lots No. 1 and No. 4 on the map?" (Trans. pp. 9, 74 & 75).

48. In sustaining the defendant in errors's objection to and in excluding the plaintiff in error's question to said witness, viz: Whether or not the improvements made by him on the portion of the land lying east of the land between the points numbered one and four were made by him more than three years before the bringing of this suit. (Trans. pp. 9, 10 & 75).

49. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: Whether or not there were any improvements upon the lands marked on the map as "Emanuel". (Trans. pp. 10 & 75).

50. In sustaining defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "How long ago said improvements were made". (Trans. pp. 10 & 75).

51. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "About what is the value of said improvements?" (Trans. pp. 10 & 75).

52. In sustaining defendant in error's objection to and and in excluding from evidence the papers Exhibits "B", "C", "D", "E", "F", and "G", separately, offered by the plaintiff in error as matter of estoppel by record evidence. (Trans. pp. 10, & 75).

53. In sustaining the defendant in error's objection to and in excluding *seriatim* the evidence offered again by the plaintiff in error of the evidence before offered by it from volume 3 of the American State Papers, the field-notes of section thirty-eight, the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probates of wills, and original deeds before offered in evidence and excluded *seriatim* for the purpose of showing color of title in the plaintiff in error to the lands described in the complaint. (Trans. pp. 10, 75 & 76).

54. In giving, at the request of the defendant in error, the following charge, viz: "The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff". (Trans. pp. 10 & 76).

55. In sustaining defendant in error's objection to and in refusing plaintiff in error's charge, requested in writing, viz: "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark". (Trans. pp. 10 & 76).

56. In sustaining the defendant in error's objection to and in refusing to give the charge in writing requested by the plaintiff in error, viz: "The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31, 1867, was not under the water of Mobile river". (Trans. pp. 10, 11 & 76).

57. In sustaining the defendant in error's objection to and in refusing the plaintiff in error's request that the court give the charge in writing, viz: "If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark". (Trans. pp. 11 & 76).

58. In sustaining the defendant in error's objection to and in refusing the plaintiff in error's request to give the charge in writing, viz: "If the jury believe the evidence in this case they must find for the defendant." (Trans. pp. 11, 76 & 77).

ARGUMENT.

Introduction.

The judgment of the state court appealed from is in ejectment, and is not conclusive even in the state courts.

Code Ala., 1896, §1554.
Williamson v. Mayer, 117 Ala., 259.

In this case it was held that: "The common law that a judgment in ejectment is not final, is in force in Alabama, changed only to the extent that two judgments in favor of the defendant, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the lands, or any part thereof, between the same parties, or their privies, founded on the same title".

The judgment of the Supreme Court of Alabama in this case, therefore, is not binding upon this Court.

Gibson v. Lyon, 115 U. S., 439;
Barber v. Pittsburgh Ry. Co., 166 U. S., 99.

In Alabama every issue in the original action is open to controversy in the second. The doctrine of *res adjudicata* applies to no issue on the second trial. Therefore, everything in this case is open for consideration *de novo* by this Court.

In the case of Williamson v. Mayer, 117 Ala., one of the issues was the fact of the payment of a mortgage as a bar to the suit in ejectment. This fact was considered to be open to controversy at the second trial, although found in favor of the pleader upon the first trial.

In Gibson v. Lyon, 115 U. S., 439, it is said: "As a precedent, the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the State; but it cannot have conclusive force in the courts of the United States *unless it has become a rule of property*".

Burgess v. Seligman, 107 U. S., 20;
Carroll County v. Smith, 111 U. S., 556.

It makes no difference that in the cases cited from the United States Reports that this Court laid down the foregoing doctrine in

connection with suits which commenced in the United States Courts, in the course of which the decisions of the State Courts were brought into question.

In every case, the parties to any cause in this Court have entered this forum under the provisions of the Constitution of the United States. They have come through separate doors, but when once in this forum, are entitled to be placed upon the same footing as suitors, and every canon of construction applicable to a cause originating in a United States Court applies to a cause which has been brought here by a writ of error to a State Court. The principles, above cited, laid down, are those governing this Court in its consideration of this cause.

These arguments are preparatory to the main argument, and clear the way for the consideration of this appeal, freed from the weight of conclusiveness which might be otherwise assigned to the judgment of the State Supreme Court were this an action upon contract.

The authorities cited from the State of Alabama show that this decision here brought in question is not a rule of property in that State. It will be made evident that it stands alone as the first decision of the kind, and it has been brought here for review, because the plaintiff in error believes that it is in violation of the established rules of property in Alabama, and therefore in violation of the guarantees of the Constitution of the United States, and its amendments.

The case of Doe *ex dem.* Kennedy v. Bebee, *et al.*, 8 Ala., 909, cited in the brief of defendant in error, page 17, was an action of ejectment involving the title to land reclaimed from the river in front of the City of Mobile.

At the close of the opinion in that case, COLLIER, C. J., says: "It is difficult to educe a harmonious system, even from the decisions of the federal judiciary, in respect to private land claims in the States acquired from France and Spain. The only safe course is to consider no question as concluded merely because it was directly presented by the record, unless it was considered by the court. In our own adjudications, in cases of this character, we have followed precedent where it could be found; where this has been silent, we have been guided by legal analogies, assisted by such powers of reasoning as we could command. This anomalous litigation, under the influence of the statute of limitations, and other causes, must be drawing to a close, and we think the security of the individual rights renders it proper that we should do homage to the

maxim *stare decisis*, even at the expense of some inconsistency in decision, rather than unsettle the law to any great extent, with the intention of establishing more uniformity."

This Court, upon writ of error, will consider and revise the rulings of a state court in the matter of admitting evidence to establish a fact, whenever it is sought to give such evidence effect for other purposes which do involve questions giving this Court jurisdiction.

Mackay v. Dillon, 4 How., 447.

1.

1st., 8th., 54th. and 58th. Specifications of Error.

The Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Mobile.

The foundation stone of the judgment of the Circuit Court of Mobile and of the Supreme Court of Alabama, is the act of the General Assembly of Alabama, entitled "An Act granting the City of Mobile the riparian rights in the river front", approved January 31, 1867.

More than twenty years before the commencement of this suit, a court having jurisdiction construed the act of Alabama of January 31, 1867, in a case in which the City was a party, as not conferring upon the City of Mobile any rights of ownership to any part of the river front of the City; and that judgment was affirmed by this Court by the dismissal of the City's appeal.

City of Mobile vs. Leverich, October Term, 1874, Number 2 (110 Fed. Rep., 170).

Moreover, the Supreme Court of Alabama subsequently to the aforesaid decision of the United States Circuit Court had occasion to consider this same act of January 31, 1867, in the case of the Mayor, etc. vs. Moog, 53 Ala., 561, decided in 1875 or '76.

The opinion is by Justice MANNING, who was a member of the bar of Mobile when elected associate justice of the State Supreme Court. The judgment had been rendered in the Circuit Court of Mobile County, from which the City had appealed. The appellees relied upon the said act of January 31, 1867, and the same counsel represented them who represented

the City in the case of Leverich, in the United States Circuit Court. Judge MANNING, meeting their argument, said: "It is argued by counsel for appellees that the question is affected by act No. 278, 'granting to the city of Mobile the riparian rights in the river front,' approved January 31, 1867, which enacts that 'the shore and soil under Mobile river, situated within the boundary lines of the city,' be granted and delivered to the city of Mobile in trust, 'to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good'."

"We do not perceive, in this enactment, the meaning suggested by the counsel of appellees. It does not express *indignation* at, does not even imply the existence of, an 'oppressive monopoly' at Mobile, extorting through a combination, exorbitant wharf charges. The direct effect of the act, *if valid*, and its object, would seem rather to be to transfer the right and power of the State in and over the shore of the river, and the soil under it, in front of Mobile to that city, to be exercised by it, as the State should exercise them, for the general good, in preventing the navigability of the river from being impaired, and in restraining purprestures along the river front below the high-water line, by prescribing the manner in which, and the extent to which, the wharves and other structures should be built into or over the water. In respect to the exercise of this power, the cases cited below might be advantageously consulted. Dutton v. Strong, 1 Black's (U. S.) 23; Yates v. Milwaukee, 10 Wallace, 497; Hagan v. Campbell, 8 Porter, 9; Pollard's Lessee v. Hagan, 3 Howard, 212." (Pages 568 and 569.)

It will be remarked that Judge MANNING questioned the validity of the act of January 31, 1867, but, without deciding that it was invalid, he said, admitting its validity, that the object of the act is simply that of regulation to protect navigation, and in the course of that, cites Hagan v. Campbell, 8 Porter, 9, wherein it is said by the Court, speaking by Chief-Justice COLLIER, viz., "But, even supposing that the Spanish grant only conveyed the title to what was known as high water mark at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion. And if accretion is made impracticable without the authority of Government by the labor of some third person excluding the water from its former limits, shall such third person, who was himself a trespasser, derive a profit, or shall not he who has

been deprived of an increase of soil by natural causes, enjoy what art has reclaimed? We merely propound this inquiry; the view we have taken of the case does not render its solution necessary. We need not consider whether if the present were a controversy for land made by alluvium, the north south lines should not take the nearest course from high water mark to the river. And it is alike profitless to inquire whether one who does not own the adjoining land may erect a wharf or other improvement for the benefit of commerce between high and low water mark, since it is clear that no part of such erections can be rested upon land of a third person, *nor can such third person be excluded the use of the water, or denied other riparian rights.*" 8 Port. (Pages 33, 34.)

The act of January 31, 1867, was cited by counsel in the case of Boulo v. New Orleans R. R. Co., 55 Ala., 480. This case involved a portion of the water front of Mobile, and was decided in 1876-77.

The Court in that case, speaking by Chief-Justice BRICKELL, affirm the doctrine of Leverich v. City of Mobile, and say: "The title to the *locus in quo*, which is part of the shore of a tide-water stream, resides in the State. Its use for the purposes of commerce, by the public, is not only permissible, but is the *trust annexed to the title.* Such use is consistent with, and not in opposition, or hostility to the title. *Presumptions of grant, or of a license, when an exclusive, continuous appropriation to private use has existed for twenty years, may be indulged.* But an exclusive, hostile possession, illegal without license or grant, is essential to create the presumption". (Page 493.)

There is a line of decisions in the Alabama reports from the early days, of the State, relating to the river front of Mobile, all of which have recognized private ownership of said front. Some of these ultimately reached this Court on appeal.

1st. The case of Hagan v. Campbell, 8 Porter, 9, before cited, was decided in 1838.

2nd. The case of the City of Mobile vs. Eslava, 9 Port., 577 (16 Peters, 234), decided in June, 1839. (Cited in Mr. Smith's brief, p. 17.)

The Court, by COLLIER, Chief Justice, say: "Though the city of Mobile existed as a town long anterior to the treaties of St. Ildefonso and Paris, yet even since the latter period extensive

reclamations have been made of the shore of the river which bounds it on the east, as well by alluvion as by the employment of artificial agents. In this way several streets have been added in the eastern part of the city, running north and south, so that *at this time the principal seat of commercial business is on ground rescued from a bed of water, since the Spanish authorities yielded the possession to the United States.*" (Page 589.)

The Court further say: "The king may grant the soil of tide-waters to an individual, yet the grantee cannot so exercise his right of property as to injure the paramount right of navigation. The interest of the grantee has been aptly compared to that of a person who owns the fee simple of a road, who, when the road is discontinued, may appropriate the ground to his own purposes, but until then he cannot obstruct its passage. Lord HALE says that the *jus privatum* of the proprietor is subject to the *jus publicum* of the community. How far the grantee of the soil may make reclamations, so that he does not disturb navigation, is an interesting question, about which there is a want of entire harmony in the *dicta* and decisions on this branch of the law. All, however, agree that as the shore becomes derelict by the receding of the waters, he may appropriate it to private purposes. Angell on Tide Waters, 29, 33, 34, 135 to 143; Rex v. Lord Grosvenor, 2 Stark. 511; Blundell v. Catterall, 5 Barn. & Ald. 268; Harg. Tracts, 32; Attorney-General v. Richards, 2 Anst. 603. In Hagan v. Campbell, the confirmatory grant made by the authorities of Spain extended the title of the grantees across the shore to the channel of the river. According to the common law such grant was unobjectionable; it neither expressly or impliedly authorized any interference with the public right of navigation, nor did it appear that it had produced such a result. But if it had been attempted to be made the instrument of injury to the public, the grant would not thereby have been rendered void; the preventive power of the law, by its interposition, might have restrained it to a legitimate purpose. For anything disclosed by the record in that case, it may have been the intention to convey a title to the soil, *without conferring an authority to occupy it*, until it had ceased to be covered by the water, nor did it appear that it was occupied at an earlier period. It is, then, clear that the grant, on its face, if tested by the rules of the common law, is valid". (Pages 591 to 592.)

"The territory which had, or should be discovered in America,

being vested in the Spanish monarchs, it followed that they might create a political power there, or retain the reins of government in their own hands, and parcel out the lands to such individuals as they might, from time to time, select ; and the power created might be invested with all the incidents of property in the tide waters, of which the subject was susceptible ; or the king might confer upon his grantee a proprietorship quite as ample ". (Page 594).

Further they say : " Again, it has been held to be a legal presumption, ' that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the Government in whose name the acts were done '. And consequently grants by them of the public lands, ' by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted '. True, ' a grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal and complete execution of the official grant, under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated '. United States v. Arredondo, 6 Peters, 727 ; New Orleans, v. U. S., 10 *Ib.*, 727 ; see also 9 Cranch, 99, and 5 Wheat. 303." (Page 596.)

3rd. Magee v. Hallett, 22 Ala., 699, decided in 1853.

This was ejectment for a portion of land in the city of Mobile reclaimed from the river.

In this case the Court say : " This grant has twice been before this court ; and in Hagan v. Campbell, *et al.*, 8 Porter 9, it was held that the plat or plan of survey which accompanied made part of the grant of 1807 ; and that the north and south lines of the original grant must be extended without variation, to the channel of the river ; and that all the land lying east of said grant and the channel of the river, between such lines as extended, was conveyed by the Spanish grant to Forbes & Co. In Hallett & Walker v. Doe, *ex dem.* Hunt, 7 Ala. 882, the decision on the last point was affirmed, and we are satisfied with its correctness. It was also held in that case, that the Spanish grant, under the operation of the confirmatory act, was valid and complete by itself, requiring nothing to

be done to perfect it; that the recognition of its validity by Con gress operated as a regrant, to the full extent of the concession, an that it was superior to any incomplete grant from Spain". (Pag 714.)

The Court further say: "It results from these views, that th south boundary of the Orange Grove tract was the line marked b Collins as such in 1802, extended without variation or deflection t the channel of the river at the date of the grant in 1807; and that line drawn from that point to low water mark at the time of th trial, at right angles with the channel, is the line to which the pro prietors were entitled to claim riparian rights in that direction that the only question for the jury, in relation to the boundary o this grant, was simply to locate this line, to ascertain where it ran. (Page 717.)

But the general rule in Alabama has always been that the owne of lands bordering on a navigable river, owned to the line of lo water-mark.

The rule is laid down in Webb v. Demopolis, 95 Ala., 116. Th Court, speaking by Justice McClellan, say: "The rule whic this State has adopted and declared through this Court is that a grant by the United States to land bordering on navigable river includes the shore or bank of such river, and extend to the water line thereof at low water.—Williams v. Glover, 66 Ala 189; City of Demopolis v. Webb, 67 Ala. 670. And this doctrin was long ago applied in a case like the one at bar, this court hold ing that the dedication of a street bordering on navigable water ex tends to low-water mark.—Doe, *ex dem.* v. Jones, 11 Ala. 63. (This was also a Mobile case.) (Page 129.)

In Demopolis v. Webb, 87 Ala., 670, the Court say: "Unde our decisions, when a person owns land on a navigable river, hi ownership is held to extend so far as to embrace the land betwee high and low water marks. Williams v. Glover, 66 Ala. 189. Bu a landing, or wharf, may be private property, and the public be per mitted to use it by license or for a charge."

In Williams v. Glover, 66 Ala. 189, the Court say: "The owner ship of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low wate marks.—Bullock v. Wilson, 2 Por. 436; Mayor v. Eslava, 9 Por 577; Howard v. Ingersoll, 17 Ala. 780, 791; 3 Kent's Com., marg 427, note *d*." (Page 193.)

This doctrine was enunciated as early as 1835, in the case of Bullock v. Wilson, 2 Por. 436.

The Supreme Court say, per Chief Justice SAFFOLD, the law to be that as enunciated by Chief Justice PARSONS, viz: that "by the common law of England, which our ancestors brought with them claiming it as their birthright, the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right; but if his land was *bounded on the sea or an arm of the sea*, where the tide ebbed and flowed, he could not by such boundary, hold any land below the *ordinary low water mark*, for all the land *below* belonged to the king." (p. 448.)

And, further, they say: "It is obvious, however, *that with us the question does not depend on the tide, or fresh water;* that if the river has been expressly recognized as a public highway by the Federal and State governments, or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the Government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in the case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed *beyond the low water mark*" (p. 448).

In 3 Kent's Commentaries, in the edition of 1854, in the note "*b*" to star page 430 it is laid down as follows, viz: "In Alabama the rule is, that every water course, suited to the ordinary purposes of navigation, whether the tide ebbs and flows or not, is a public highway, and the riparian owner cannot assert any private right of soil to the bed of the river *beyond the low water mark.*"

"The question in that State does not depend upon the common law test of the ebbing and flowing of the tide".

The case of Bullock v. Wilson was cited in support of the principles above enunciated in the case of Bayzer v. McMillan, 105 Ala., 395, which also cites the case of Sullivan v. Spotswood, 82 Ala., 163, which was also a Mobile case, referring to waters in the immediate vicinity of Mobile, opening into the Mobile River just above the lines referred to in the Act of 1867. In that case the Court say: "The lease of the booming facilities in connection with the water front is a lease of the right of the owner, which appertains to the riparian title, to erect booms to aid in storing and floating logs to market. * * * * * * * * * The lease transfers and assigns the right to construct proper booms adjacent to the water front, subject to the public right. Its terms neither express

nor imply a right to appropriate and occupy the soil under th water"; clearly recognizing that Spotswood could have made lease of the soil under the water, and the use of it, "subject t the paramount right of free navigation". (p. 168.)

The case of Webb v. Demopolis, 95 Ala., 129, cites 11 Ala., 63 Doe, *ex dem.* Kennedy v. Jones.

This was a Mobile case involving land which this Court judiciall knows is within the limits of the river front embraced in the Act o January 31, 1867, "granting to the city of Mobile the riparia rights of the river front." In that case the Supreme Court of thi State held the following to be a good charge (page 67), viz.:

"1. If they believed that St. Louis Street had been dedicate and established under the government of Spain, as a public stree and was so recognized previous to the treaty with France, by whic Louisiana was acquired, and that it extended to the river of Mobil then the fee of the street would be in the *public, for the use of th city, that all riparian rights in front of that street would belong t the city,* that the corporation of Mobile would succeed to the Spanis town, and the city was entitled to the fee in the land. Further, th extension of the street to the river, from time to time, after th change of flags, would not prevent the corporation from holding b the same right, the *riparian right would belong to the street, and th city, and the plaintiff could not claim it.*"

This was a positive adjudication that the lands between high an low water belong to the owner of the fee of the soil adjoining th river in the city of Mobile, *and not to the State.*

In the case of Hagan v. Campbell, 8 Porter, page 33, decided i 1838, the Court say: "But *even supposing* that the Spanish gra only conveyed the *title, to what was known as high-water mark,* the time it was made, the plaintiffs would then have been entitle as riparian proprietors, to *every increase of land by alluvion.*" (Th Court holds this to be the common law doctrine. New Orlea vs. United States, 10 Pet., 717).

In Kemp v. Pollard's Heirs, 3 Ala., page 294, decide in 1842, the Court say: "What is said by the court of property in the shore passing to the State, upon i admission into the Union, *cannot,* when fairly interpreted, b understood to *mean the absolute ownership, but merely the right jurisdiction and control,* subject to the paramount right which repeatedly conceded to the public, and which the United Stat may protect".

In this the Alabama Court only continued to follow the doctrines of the courts of the State of Georgia, from which State the territory out of which the territory of Alabama was formed, was derived by cession to the United States.

In Georgia, also, the right of the owner of lands adjacent to navigable streams, extends to low water mark.

Shively v. Bowlby, 152 U. S., 25, 26.

It is seen, therefore, that the construction of the act of January 31, 1867, to the effect that it does not confer upon the State any right to interfere with the possession of the water front of the city by the owners of the lands adjacent thereto, has not only been established directly by adjudications involving the act itself, made more than twenty years before the judgments here complained of, but to be in strict accordance with adjudications involving said water front, made before the passage of said act, and in strict accordance with the general law as to ownerships of soil between high and low water mark of navigable rivers in Alabama.

These decisions certainly constitute a rule of property in the nature of a contract with the owners of lands adjacent to the Mobile river.

The recent rulings of the Supreme Court of Alabama, complained of in these proceedings, are not different in legal effect from that of a new statute enacted by the General Assembly of Alabama, affirming the contention of the City in the Leverich case and the Moog case, as to the scope and legal effect of said act of January 31, 1867.

Such legislation, unless it provided for compensation to the plaintiff in error, would be unconstitutional, because impairing vested rights.

New Jersey v. Wilson, 8 Cranch, 164;
Fletcher v. Peck, 6 Cranch, 87, 135;
Kaukauna Co. v. Green Bay, &c., Co., 142 U. S., 254.

Besides the Alabama cases heretofore cited, there are a number of decisions in the Supreme Court of Alabama and in this Court, whose record bears testimony to the fact that, to within less than two hundred feet of Royal Street, the business part of the City of Mobile is entirely erected upon reclaimed land lying between high-water mark and the channel of the river, and owned by private individuals.

These are

Pollard v. Kirby, 14 Peters, 362, 422, 423 ;
Mobile v. Emanuel, 1 How., 95 ;
(Same Case), 9 Port. (Ala.), 403 ;
Mobile v. Eslava, 16 Peters, 234 ;
(Same Case), 9 Port. (Ala.), 577 ;
Pollard v. Files, 2 How., 591 ;
(Same Case), 3 Ala., 47 ;
Watkins v. Holman, 16 Pet., 51 ;
Chastang v. Dill, 19 Ala., 421.

The map which forms part of the record in this court in the case of the City of Mobile v. Leverich, shows that there are three streets parallel to Royal Street, and wharves and the extension of streets situated between Royal Street and the channel of the river, built upon land shown by the records above to be below high water mark. In fact these lands thus originally under the waters of Mobile river constitute the entire business part of the city of Mobile.

That the decisions of the Supreme Court of Alabama have always been harmonious and consistent with the private rights of owners of land bordering upon so-called tidal waters, at or near Mobile, is shown also in the case of Sullivan v. Spotswood, 82 Ala., 163.

This was a case of a bill filed to prevent the defendant from interfering with a boom.

The opinion shows that the locus was a bayou "*within tide water*", about four and a half miles above Mobile. "It is a recess of Chickasabogue creek, which is admitted to be a navigable water, and *empties into Mobile river*, whereby the bayou has navigable communication with the river, bay and harbor of Mobile. The timber trade and interests of Mobile have largely increased during the past few years, and are still increasing ; and in consequence thereof, the value, demand, and use of bayous, such as the one in question, which afford safe and convenient room for booming and storage, have correspondingly increased." (82 Ala. Page 167.)

The court refused the injunction because the boom interfered with navigation, but they recognized the riparian rights of the owner of the land adjoining the bayou.

They say : "The lease of the booming facilities, in connection with the water front, is a lease of the right of the owner, which appertains to the riparian title, to erect

booms to aid in storing and floating logs to market. The booms may be extended far enough to reach navigable water, but at the peril of obstructing navigation. They should bear relation to the shore or bank, and to the navigable water, so that the stream shall be subject to the paramount right of free navigation. This may impair or defeat private right, but private right must yield to public right. The lease transfers and assigns the right to construct proper booms adjacent to the water front, subject to the public right." (82 Ala. Pages 168,169.)

A boom is defined in 4 Ency. Law, (2nd. Ed.), page 707, as follows, viz: "A boom is usually formed by extending a series of spars for some distance at a right angle to the shore, and then continuing them up stream, parallel to the shore, leaving the upper end open".

In the opinion in the above case of Sullivan v. Spotswood, the Court reiterate what was said in State v. Ball, 5 Por. 365, by GOLDTHWAITE, Judge, viz: "'To make a navigable stream, three circumstances must occur: 1st, the stream must have sufficient width; 2d, sufficient depth; and 3d, a freedom from insurmountable obstructions.' It is true that the *flow and ebb of the tide is not regarded, in this country, as the usual or any real test of navigability; and it only operates to impress, prima facie, the character of being public and navigable*, and to place the *onus* of proof on the party affirming the contrary. But the navigability of tidal waters does not materially depend upon past or present actual public use. Such use may establish navigability, but it is not essential to give the character". (82 Ala., page 166.)

And the counsel for the defendant in error in this case in his brief upon the motion to dismiss the appeal under rule No. six of the practice in this court, says:

"The writer of this brief is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to

furnish no test whatever. Far from complaining that our court has abandoned the test in part, I am quite sure that the logical solution of the question is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows". (Page 21).

Yet the Supreme Court of Alabama in this case, whilst explicitly denying any purpose to disturb the rule in Webb v. Demopolis, 95 Ala., 126, but disregarding all previous decisions affecting Mobile and Mobile river, base their decision upon the ground that the lands the subject of this suit are tide water shores. (Record, p. 108).

But in the face of the long list of decisions of the same court, practically recognizing the rule of Webb v. Demopolis, as extending the whole length of Mobile river, as well as the extent of Spanish, French and English grants to the channel of the river ; and, also, the right of private owners to lands reclaimed from the river far below the high water mark ; this decision comes as an assault upon vested rights, and as a depriving of the plaintiff in error of property without due process of law, and without compensation.

Mobile river is not a tidal river in the sense meant by " tide " in the English decisions. Our law comes from England, where all rivers are small, and such things as high and low water due to winds and inundations are unknown. The only high and low water known to the English law is the high and low water due to the influence of the moon and sun, and which have all the regularity and precision as to time and height resultant from influences as regular and as measurable as clockwork, viz : The attraction of the sun and moon.

" The word " tide " is used to indicate the periodic rising and falling of oceanic and other large bodies of water, due mainly to the attraction of the moon and sun." " The velocity and direction of tidal currents are much modified by extremely local causes, while the times and heights of the tide remain nearly constant over considerable area ".

Tide Tables, 1901, U. S. Coast & Geodetic Survey, page 13.

"We can only define a tide by reference to the causes which produce it. A tide then is a rise and fall of the water of the sea produced by *the attraction of the sun and moon.*"

23 Ency. Brittanica (9th Ed.), 353.

"Mobile Bay is a *lagoon like estuary, cut off* from the Gulf of Mexico by the narrow sandy isthmus of Mobile Point and the chain of sandy islets on the south. It is, with the exception of a deep pocket in the southern end called the 'Lower Fleet', *extremely shallow*". * * * "The rise and fall of the *tide is small* and the *tidal currents feeble*". (Report of Commissioners on the most desirable locations for Navy Yards and Docks on the Coast of the Gulf of Mexico under the Act of Congress, Sept. 7, 1888, pp. 23, 24).

"The tides of the ports in the Gulf of Mexico, west of Cape St. George (Apalachicola Bay) ebb and flow as a rule but *once* in twenty-four hours". "The *rise* and *fall* at all these ports *are small*". (Report, Coast Survey, 1860, p. 132).

"The rise and fall at Fort Morgan, Mobile Bay, Alabama, is, mean, 1 foot; at moon's greatest declination, 1 5/10 foot; at moon's least declination, 4/10 foot."

"The rise and fall being so small, the *times* and *heights* are both much influenced by the *winds*, and are thus rendered *irregular*". (*Id.* page 158.)

"The stand at high and low water is comparatively short, *seldom exceeding an hour*". (Report, Coast Survey, 1861, p. 125).

Tuomey, Geologist to the State, says (2nd Biennial Report, Geology of Alabama, pp. 151, 152):

"About 30 miles, in a straight line, *above* Mobile, the Tombigby and Alabama Rivers meet, and here the *delta* of Mobile Bay commences. The moment the velocity of the stream is checked the deposition of sedimentary matter begins, a *long low tongue of land* is formed, which divides the combined waters into the Mobile and Tombigby rivers, which after meandering through the channels of the delta, are again subdivided into the Spanish and Apalacha rivers. The delta terminates a *few miles below Mobile.*"

"The great volume of fresh water flowing into the bay and the *very narrow* entrance, prevent the water from becoming even *brackish* at Mobile till late in the season, when the *rivers become low*".

Owing to the physical conditions above described, it results that when the wind blows from the north, the water is low in Mobile

river, because the waters of the bay are blown out of it; when the wind is from the south, the waters of Mobile river are high at Mobile, because the waters of the bay are backed up against the river. When vessels going down the bay ground during the north wind, they have to wait for release, not upon the tide, but a change of wind. In general, the stage of water in Mobile river depends upon rain and drouth in the upper country, and upon local winds, and upon nothing else.

Plaintiff in error refers to those things, because it is said by this Court, that "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

U. S. v. Rio Grande Immigration Co., 174 U. S., 697.

In Peyroux v. Howard, 7 Pet., 324, this Court held, that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place".

It is said by this Court, that "the term high water when applied to the sea, or to a river where the tide ebbs and flows, has a *definite meaning*. The line is marked by the *periodical flow* of the tide, excluding the *advance* of waters above this line in the one case by winds and storms, and in the other by freshets or floods". "But in respect to fresh water rivers the term is altogether indefinite and the line rendered uncertain". "It may mean any stage of water above its ordinary height and the line will fluctuate with every varying freshet or flood that may happen".

Howard v. Ingersoll, 13 How. U. S., 423, 424.

The river at Mobile is a *fresh water* river, as much so as at Demopolis, except as above shown, for a short period it is brackish, not salt. "A fresh water stream is *prima facie* a private stream". Walker v. Allen, 72 Ala., 456 (an authority cited by Mr. Smith in his brief at p. 13).

The rule of ownership laid down in Webb v. Demopolis applies there as well as at Demopolis, and as well as at Chickasabogue Creek, four and one-half miles above Mobile.

Recurring to the leading case in Alabama of Bullock v. Wilson, 2 Port., it is clear that the court in that case wiped out the distinction in Alabama between tidal and non-tidal river, salt or fresh water, and instead of permitting the owner of land bordering on a river to own to the thread of the stream, in cases in which the

stream is a fresh water river, they apply to all Alabama rivers the common law rule of navigable waters, as expounded by Chief Justice PARSONS, in Storer v. Freeman, 6 Mass., 438, 439, who said, "but if his land was bounded by the *sea, or an arm of the sea*, where the tide ebbed and flowed, he could not by such boundary, hold any land *below the ordinary low* water mark, for all the land *below* belonged of common right to the king." (2 Port., 448).

This rule as to the line of state proprietorship was recognized by this Court in Smith v. Maryland, where it is said: "Whatever soil *below low-water* is the subject of exclusive property and ownership, belongs to the state on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by that state, or the sovereign power which governed its territory before the declaration of independence."

18 How., 74.

In the case of Pollard's Lessees vs. Hagan, 3 How., 212, this Court rendered a decision directly, or in effect, overruling previous decisions of this Court, with the result, as stated by Justice CATRON in the dissenting opinion, of stripping all private owners of a very large portion of the second city on the Gulf of Mexico in wealth and population, of all title. He said: "On this latter point my brethren and I fully agree".

3 How., page 233.

In that case the Court assume that Mobile was upon the sea, and applied to it the doctrine of the ebb and flow of tide upon the seashore, or arm of the sea. In fact, the river front of the city of Mobile was simply swamp and overflowed lands, not sea-shore lands. As we have seen, Mobile River is not a tidal river, and if that case were to be decided to-day, we submit that the principles laid down by this Court in the case of San Francisco v. Le Roy, 138 U. S., page 656, would have led it to an entirely different result. In that case the Court, by Justice FIELD, said: "All the marsh lands, so called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp-land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat. c. 84, p. 519. The interest of the pueblo in the lands within its limits goes

back to the acquisition of the country, and precedes the passage of that act of Congress. And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. *As to tide-lands, although it may be stated as a general principle—and it was so held in Weber vs. Board of Harbor Commissioners, 18 Wall., 57, 65,—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way.* When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. Townsend v. Greeley, 5 Wall. 326, 337. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States through its tribunals recognized the validity of that title at the date of the treaty—at least, recognized the validity of the claim to the title as then existing, and in the execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement. *It is a matter of doubt whether there were any lands within the limits of the pueblo,* as defined and *established by the Land Department, that could be considered tidelands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation.* TO RENDER LANDS TIDE-LANDS, WHICH THE STATE BY VIRTUE OF HER SOVEREIGNTY COULD CLAIM, THERE MUST HAVE BEEN SUCH CONTINUITY OF THE FLOW OF TIDE-WATER OVER THEM, OR SUCH REGULARITY OF THE FLOW

WITHIN EVERY TWENTY-FOUR HOURS, AS TO RENDER THEM UNFIT FOR CULTIVATION, THE GROWTH OF GRASSES, OR OTHER USES TO WHICH UP-LAND IS APPLIED.

138 U. S., pp. 670, 671, 672.

The views of this Court respecting what constitutes the test of "tide lands", as expressed above by Mr. Justice FIELD, are only confirmatory of the doctrine enunciated by Mr. Justice WOODBURY in his dissenting opinion in the case of Waring v. Clarke, 5 How., 441. The fact illustrates the growth of the views of this Court respecting what constitutes "tide lands" just as the case of the Genessee Chief, 12 How., 443, illustrates the growth of views respecting what waters include admiralty jurisdiction.

Judge WOODBURY says: "The first doubt as to the jurisdiction in admiralty over the present case is thus sustained, but, being overruled by a majority of the Court, I proceed briefly to examine the next objection. It is one founded in fact. It denies that the tide did in truth ebb and flow at Bayou Goula, the place of this collision, in ordinary times.

There is no pretence that the water there is salt, or comes back from the ocean, or that the tide there sets upward in a current, or ever did, in any stage of the water in the Mississippi. *Yet this is the ordinary idea of the ebb and flow of the tide.* I concede, however, that it has been settled by adjudged cases, that the tide is considered in law to ebb and flow in any place where it affects the water daily and regularly, by making it higher or lower in consequence of its pulsations, though no current back be caused by it. Rex v. Smith, 2 Doug. 441; The Planter, 7 Peters, 343; Hooker v. Cummings, 20 Johns. 98; Angell on Tide Waters, 637. Yet this of course must be a *visible, distinct rise and fall, and one daily caused by the tides, by being regular, periodical, and corresponding with their movements.*" * * *

"In the next place, several witnesses testify as to their observations in respect to the tides, and confirm what might be expected from these collateral facts. The most scientific among them took frequent observations for two years, at or nigh Jefferson College, thirty-seven miles nearer the sea than the place of this collision, to ascertain this very fact, and testifies *that no regular daily influence is felt there from the tides. Oscillations may occur, but not regularly, nor as tides.* They happen in that way even near the foot of the Falls of Niagara, but of course are produced by causes entirely dis-

connected from the tides of the ocean. So they happen, from other causes, on most of our interior lakes."

"Sometimes continued winds in one direction make a great difference in the rise of the water at different places; and sometimes, the emptying in near of large tributary streams, changeable in their size at different seasons. Both of these are testified to occur in the Mississippi in its lower parts. At high water, which prevails over half the year, from rains and the dissolving of snow, it also deserves notice, that the fall of the river towards the ocean is near one and two-thirds of an inch per mile; and the difference between high and low water mark near Bayou Goula is also, as before noticed, from thirty to thirty-three feet."

"From all this it is easy to see, that, during more than half the year, *it is hardly possible that a regular tide from the ocean should be felt there*, though it is admitted that, in conflict with this, some witnesses testify to what they consider such tides there, and indeed as high up as Bayou Sarah. But their evidence is insufficient to overcome, in my mind, the force of the other facts and testimony on this subject."

Waring v. Clarke, 5 How. U. S., pp. 496, 497 and 498.

It is clear that this Court has adopted the doctrine of Judge WOODBURY that the test of a "tide" such as the law recognizes is, a daily, regular, rise and fall of the water, such as can be predicted with certainty.

None of these conditions exist in Mobile river, at the City of Mobile, as was before above demonstrated.

Applying this test of what constitutes tide-land, to the land the subject of this controversy, and to the entire front of the City of Mobile, there is no such tide-land within the limits of the city of Mobile. The evidence of Toumey, State Geologist, the reports of the Coast Survey, and the Historian Hamilton show that no such lands as "tide-lands" ever existed within the limits of the city of Mobile under any of its charters.

They show very clearly that these lands were of the character natural to all great rivers of the West and Southwest, viz. swamp and overflowed lands; but at the period of time when the decision in 3 How. was rendered this classification of lands had not yet been established by the legislative department and was unknown to the judicial department.

The State itself construed the law of riparian ownership along

Mobile river, within the limits of the city of Mobile, to be as laid down in Bullock v. Wilson, 2 Port., and Webb v. Demopolis, 95 Ala., by a series of acts antedating the act of January 31, 1867, long enough to have established the doctrines of those cases as applicable to the river front of the city of Mobile as a rule of property, beyond assault of legislation, and protected by the Constitution of the State of Alabama and of the United States.

In 1854, the Legislature passed the act of February 16th, 1854, Acts 1853–4, page 476, entitled "An Act to authorize the corporate authorities of the city of Mobile to regulate wharves and wharfage in said city.

Section 1st. of said Act is as follows: "Sec. 1. Be it enacted, &c., that in order to change the present system of wharfage in the city of Mobile, and to substitute dockage charges on vessels in lieu of charges on produce and merchandise, the Mayor, &c., of the city of Mobile shall have power and authority to obtain, *by contract*, the property in, or the control of, the wharves and wharf property in the city of Mobile, so far as the same may be *practicable*, &c".

In 1860, the Legislature inaugurated legislation for the Improvement of the Bay and Harbor of Mobile.

The first act was approved 21st. February, 1860.—Acts Ala., 1859-60, p. 35.

(1) The 3d. section confers upon said Board power and authority to cause a channel, at least three hundred feet wide, to be opened and kept open from the place of anchorage in the bay of Mobile, known as the lower anchorage to the city of Mobile.

(2) The 9th. section of the act establishes a Board, and by it "Said Board is authorized to make such improvements in Mobile River in *front* of the city of Mobile, and as *far up* as the head of Spanish River, as to them may seem necessary to the commerce of said city, *not inconsistent with private rights.*"

(3) Section 13 of that act authorizes the city to build wharves in *front* of the *foot* of the streets, &c.

It requires the engineer to see that the excavations are deposited on some point or points to the *westward* of the *western line* of the channel to be dug. It makes it the duty of the Harbor Commissioners to make arrangements with the *owner* or *claimant* of *riparian lands* that may be suitable for the deposit of said excava-

tions, to *convey* the same to the city of Mobile for the purpos aforesaid. In the event the *owners* or *claimants* of riparian lanc refuse to convey the same to the City, it provides the mode of co demming the same by a jury of inquest. The following proviso embodied in this section: "Provided, however, that nothing in th act shall be so construed as to abridge the right of the State Alabama, to *abate* any wharves or wharf rights in said city shoul they become public nuisance".

Sec. 60 of the City charter of 2d. February, 1866, (See Ac 1865–6, pages 223–4), referred to in the act of 1867, enacted as fo lows; viz.: "Section 60—Be it further enacted, that in order t carry out the system of wharfage in the City of Mobile, herein pr vided for, &c. &c., the Mayor, &c. of the City of Mobile, shall hav power and authority to obtain by *contract* or *purchase*, the propert in or the control of the wharves and wharf property of the City Mobile, *so far as the same may be practicable*" &c., &c.

And in 1868, December 8th, (see Acts 1868, p. 394), the act wa passed entitled "An act to carry into effect paragraph 26, art. 1, the Constitution of Alabama, as follows, viz:

"Sec. 1. Be it enacted by the General Assembly of Alabam that *riparian owners*, upon the navigable and *other* waters this State, who maintain in good order for public convenienc erections and ferries on the banks *or shores* of said water shall be entitled to charge usual and reasonable rates fo the use thereof, or such rates as are prescribed in the several act heretofore passed, authorizing such erections or ferries, or *agree upon* by said *owners* with the corporate authorities of any city, tow or county, in which they are situated, Provided, no erection structure, or ferry, of any kind, shall be permitted injuriously t affect the rights of navigation in said waters", now § 2514, Cod 1896.

The "bank" of a river is defined in the Encyclopædia of Law as "that space of rising ground above *low-water mark*, which i usually covered by ordinary high water."

3 Ency. Law (2 Ed.), page 784.

And the same authority defines the "shore" as "that space o land on the borders of the sea which is alternately covered and lef dry by the rising and falling of the tide; or, in other words, that *space between high and low water mark*."

22 Ency. Law, (1 Ed.), page 778.

The Supreme Court of Alabama has also defined these words in the very elaborately considered case of Howard v. Ingersoll, 17 Ala., page 780, which was also before this Court and reported in 13 How., 381. This cause originated in 1845, and the opinion was rendered at the January Term, 1850, of the Supreme Court of Alabama. In this case Chief Justice DARGAN cites with approval the case of Morgan v. Livingston, *et al.*, 6 Martin La. Rep. 19, saying: "Judge MARTIN defined the bank of a river thus: 'it is that space which the water covers, when the river is highest at any season of the year'; of course he must have meant that space upon the rising ground above low water, but covered by high water, for he then proceeds to say that the river consists of three things, the water, the bed, and the banks, and he could not have intended to include in the definition of the term bank, the bed of the river. The bank of a river may be said to be that space of rising ground *above low water mark*, which is usually covered by ordinary high water. We cannot conceive of any other definition more accurate than this; for the rising ground above low water cannot with any propriety be said to be the bed of the river, and therefore it must be the bank". Page 789.

Further on the Chief Justice says: "I do not think it necessary to examine the numerous decisions, with which our books abound, and to many of which we have been referred, for they are in reference to the rights of individual owners of lands adjacent to the river. It may, however, be safely said, that when a private grant is bounded by the bank or a running stream, in which the tide does not ebb and flow, no well considered case can be found that limits the grant short of low water mark, unless there be other words or expressions used in the deed, showing that the parties did not intend that the grant should extend to low water mark. In the case of Child v. Starr, 4 Hill, 369, Chancellor Walworth said, 'the shore of tide water is that portion of land alternately covered by water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river, in which the tide does not ebb and flow, has no shore; it has *ripam*, but not *littus*. The term shores, however, when applied to such a river, means the river's banks, *above low water mark*, or rather those portions of the banks of the river which touch the margin or edges of the water of the stream. A grant, therefore, that is bounded by the shore of a fresh water river, conveys the land to the water's edge, *at low water!*" Pages 791, 792.

This case is cited by the Alabama Court with approval in the

case of Williams v. Glover, which originated in September, 1876, and was decided at the December Term, 1880, wherein STONE, Judge, afterwards Chief Justice, says: "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks.—Bullock v. Wilson, 2 Por. 436; Mayor v. Eslava, 9 Por. 577; Howard v. Ingersoll, 17 Ala. 780, 791", etc.

66 Ala., 189–193.

The attention of the Court is also called to the act "To Provide for the Improvement of the River, Bay & Harbor of Mobile, Approved Feb. 16, 1867 (Acts Ala. 1866–67, p. 507).

The 4th. section of said Act is as follows, viz:

"SEC. 4. *Be it further enacted*, That in addition to the foregoing powers, the said commissioners are vested with the authority to *purchase* and *condemn lands*, according to the provision of section thirteen of an act, for the improvement of the bay and harbor of Mobile, approved February 21st, 1860; and to take and receive all moneys, papers, books, records and surveys, and all property pertaining to said commissioners, in said act, and the city of Mobile, shall be vested with the title of all lands *made by the deposits of all excavations in the progress of this work* as provided for in said act, and the commissioners designated in this act, and all officers, clerks and employees, shall be subjected to, and be held liable to the duties, penalties and punishments provided for in the fifteenth section of the said act".

This Act was passed by the same Legislature, which passed the other act within a short time after it, and clearly shows that the Legislature did not mean to deny or to impair riparian rights of owners of land along Mobile River in front of the City of Mobile. It is a clear legislative expression of meaning, of the act of January 31, 1867.

There is another act of the General Assembly of Alabama subsequent in date to the said Act of January 31, 1867, which distinctly establishes the riparian rights of owners of lands fronting on Mobile bay and river, which the Supreme Court disregarded in this case.

On February 28, 1872, the said Assembly enacted, "That from and after the passage of this act all owners of lands fronting on any of the bays, rivers, creeks, havens, bayous or creeks within this State, shall be and they are hereby granted the right to plant oyster

beds and gather the oysters therefrom, to the *channel* of said bay, river, creek, haven, bayou or creek ; *Provided*, Such channel be not more than six hundred yards from the shore ; *Provided further*, That nothing shall be done to impede or obstruct the navigation of said bay, river, creek, haven, bayou or creek, or to in anywise impair the riparian rights of the State, or its title to the same as overflowed lands ; but that upon the assertion of the rights of the State the owner of said oysters shall have the right to remove and take the oysters therefrom."

This law forms parts of the Codes of 1886, as section 1385, and of the Code of 1896 as section 3155. This court judicially knows that there is only one bay in Alabama, viz: the bay of Mobile.

The law above cited is certainly inconsistent with a decision excluding absolutely the owner of land, admitted to front on Mobile bay or river, from the use of its front, as does the judgment appealed from in this case. The judgment certainly deprives the plaintiff in error of this positive franchise, without compensation. The right to plant oysters is a right of property.

McCready v. Virginia, 94 U. S., 391.

No court ought, unless the terms of an act render it unavoidable, to give a construction to it which involves a violation however unintentional, of the Constitution.

Parsons v. Bedford, 3 Pet., 448, 449.

The term "property" as applied to land comprehends every species of "title" inchoate or complete.

Souland v. United States, 4 Pet., 511,

referring to the Treaty by which Louisiana was acquired by the United States.

2.

The judgment arbitrarily ascertains boundaries of lands. Boundary question is always matter for determination by the *jury*, according to evidence, not of the court.

Barclay v. Howell's Lessee, 6 Pet., 509-10.

The map admitted in evidence (Record p. 72) as exhibit "**H**", shown on page 86 of the record, shows nothing at the points indicated in the complaint as the west boundary of the lands sued for

to show that they are under the river. On the contrary the point marked 1156[1] on the south line of the lot marked "John Hogan" is even *further back* westwardly from the river than the line marked "High Tide", "Drift Wood line", about twenty feet.

For the the court to take this question of boundary from the jury, and to arbitrarily decide that all the land east of the point "1156[1]" is under the high water mark, deprived the plaintiff in error of its property without due process of law, and violated the 14th. amendment to the Constitution of the United States.

In expounding this amendment this Court say: "The prohibitions of the Fourteenth Amendment refer to *all the instrumentalities of the State*, to its legislative, *executive* and *judicial authorities*, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, "violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State".

Chicago, Burlington & Q. Rd. v. Chicago, 166 U. S., p. 226.

The court say further: "The prohibitions of the Fourteenth Amendment have reference to actions of the political body denominated a State by *whatever instrument* or in *whatever words* that action may be taken. A state acts by its legislature, its executive and its judicial authorities. It can act in no other way".

"But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons".

Ex parte Virginia, 100 U. S., p. 347.

This Court say further: "Due process of law and the equal protection of the laws are secured *if the laws operate on all alike*, and do not subject the individual to an *arbitrary exercise of the powers of government.*"

Duncan v. Missouri, 152 U. S., p. 382.

The court say further: "Due process is so secured by laws operating on *all alike*, and not subjecting the individual to the arbitrary exercise of the powers of government, unsustained by the established principles of private right and distributive justice".

Caldwell v. Texas, 137 U. S., p. 697.

The court say further : " The great purpose of the requirement (Due process of law) *is to exclude everything* that is arbitrary and capricious in legislation affecting the rights of the citizen."

Dent v. West Virginia, 129 U. S., p. 124.

The court say further, that equal protection of the law is " Whenever the law *operates alike* on *all* persons and property *similarly situated* ".

Walston v. Nevin, 128 U. S., p. 578.

In order that the court may understand the map in the record, counsel states to the court that the two parcels of land comprising the property of plaintiff in error are those marked respectively " John Hogan " and " Emanuel Est."

The protection of the 14th amendment applies to all the instrumentalities of the State.

Blake v. McClung, 172 U. S., 260.

And it is said in Chicago &c. R. R. Co. v. Chicago, 166 U. S., 235 : " In determining what is due process of law regard must be had to *substance*, not to *form* ".

" A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

166 U. S., page 241.

It is further said in that case : " The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation ".

166 U. S., pp. 236, 237.

A corporation is a person within the meaning of the Fourteenth Amendment.

Santa Clara Co. v. Pacific R. R. Co., 118 U. S., 396 ;
Smyth v. Ames, 169 U. S., 522 ;
Blake v. McClung, 172 U. S., 259.

This court does not follow the State Supreme Courts. When the question involved in a writ of error is whether or not the Fourteenth Amendment is violated; this Court refuses to follow the construction given the local act by the Supreme Court of the State. In the case of Yick Wo v. Hopkins, 118 U. S., 356, wherein this Court say: "We are constrained consequently at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question. *We are not able to concur in that interpretation of the power conferred upon the supervisors*". (Page 366.)

"This *erroneous view of the ordinances in question led the Supreme Court of California into the further error* of holding that they were justified by the decisions of this court in the cases of Barbier v. Connolly, 113 U. S., 27; and Soon Hing v. Cowley, 113 U. S., 703". (Page 367.)

This Court follows the decisions of the highest court of a state, in construing the constitution and laws of the State, *unless* they conflict with or impair the efficacy of some principle of the Federal Constitution or of a Federal Statute, or a rule of commercial or general law".

Norton v. Shelby Co., 118 U. S., 425, 439.

In the case of the Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685, the construction put upon a statute of New York by its Court of Appeals was assailed in argument, and the Court say: "These conclusions of the Court of Appeals are vigorously challenged in the argument, but *we are of opinion they are correct*". (Page 696.)

This Court did not say it had nothing to do with the correctness or incorrectness of the State court's construction of the State law, and would have to accept it, whatever it might be. It passed judgment upon the State Court's conclusions and concurred with them. It might have non concurred with them.

In Board of Liquidation v. Louisiana, 179 U. S., 622, this Court, whilst affirming the State Supreme Court, say: "When the jurisdiction of this Court is involved because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract".

179 U. S., p. 638.

And in New Jersey v. Wilson, 8 Cranch, 164, it is said that a right vested is a contract executed, and a statute impairing a vested right impairs the obligations of a contract.

It is true that the Supreme Court of Alabama did not in its opinion expressly refer to the Constitution of the United States. (Trans. p. 106.) But that circumstance is not conclusive against the jurisdiction of this court to reexamine the final judgment of the State Court.

The judgment of affirmance necessarily denied the Federal rights thus specifically set up by the plaintiff in error; for that judgment could not have been rendered without deciding adversely to such claims of right.

Chicago, Burlington &c R'd. v. Chicago, 166 U. S., 231-2.

10th, 18th-36th incl., 38th-40th incl. 53d Specifications of Error.

STATUTE OF LIMITATION.

The Statute of Limitations applicable to this case has been in force since the adoption of the Code of Alabama of 1852.

	20 yrs.	10 yrs.
Code 1852, Secs.	2475;	2476.
Code 1867, Secs.	2899;	2900.
Code 1876, Secs.	3224;	3225.
Code 1886, Secs.	2613;	2614.
Code 1896, Secs.	2794;	2795.

They have been construed in the following cases:

State v. Conner, 69 Ala., 212.
Wyatt v. Tisdale, 97 Ala., 596.

Conner's case is that of a statutory real action in ejectment brought by the State for the use of a township to recover a quarter of a sixteenth section, being public school lands. It was commenced November 30, 1876. The State asked the trial court to charge the jury: "If the evidence in this case shows to the jury that this action is brought for the recovery of sixteenth section school lands belonging to the township, then the plea of the Statute of Limitations of ten years does not apply in this case." The court refused to give this charge. Judgment was rendered for the defendant and the State appealed.

69 Ala., 214.

The Supreme Court of Alabama say: "The Circuit Court did not err in refusing the charges asked," and affirmed the Circuit Court's judgment.

They say: "The gist of it is, that the defendant and those under whom he claims, have held continuous, adverse, or independent possession for ten years next before the suit was brought."

69 Ala., 217, 218.

Wyatt v. Tisdale, 97 Ala., 594, was also a case of ejectment, brought by Tisdale against Wyatt in December 1890, in the Crenshaw Circuit Court.

The plaintiff introduced a grant made by the State in 1882, and rested.

The defendant introduced the deposition of one Ellison, who testified that one Tisdale made him a deed to the lands sued for in 1864, and that he paid Tisdale the purchase money. This evidence was excluded, and the general charge given for the plaintiff, Tisdale. This judgment was reversed by the Supreme Court of Alabama, in 1892-3.

The Court say: "It will be seen from this statement of the facts that at least from December, 1863, to the time of the commencement of this suit, a period exceeding twenty-five years, the defendant in ejectment, and those from whom by mesne conveyances she derived title, had been continuously and adversely in possession of the land, under color of title, holding and claiming the same in their own right. The continuity of the adverse possession was unbroken during the entire time. It is contended, however, that the statute of limitations does not run against the State, that the maxim '*nullum tempus occurrit rei publicæ*' applies. Such is the law, unless the statute expressly by its terms is made to apply to the State, or unless it is clear from the statute that it was so intended.—Miller v. State, 38 Ala. 600."

"Our statute prescribing the time within which suits must be brought, which has been in force at least since the adoption of the Code of 1852, is as follows: Section 2613. Limitations of twenty years. Within twenty years.

1. Actions at the suit of the State against a citizen thereof for the recovery of real or personal property.

2. Actions by or for the use of any township for the recovery of any sixteenth section or other school lands belonging to the township.

The authority of the legislature to make the statute apply to suits by the State, or for the recovery of sixteenth section lands, is not doubted, and *there is no reason why a different construction should be given to the statute or a different principle applied when the suit is by the State, or one claiming through the State, than that applied to private persons.*"

The Court further say : " If the jury believed the phase of the evidence as we have stated it, the verdict should have been for the defendant ".

97 Ala., pp. 595, 596.

Prior to the Code of Alabama of 1852, the statute of limitations as to entries upon lands was twenty years.

Clay's Digest, 327, sec. 83.

Construing this the Supreme Court of Alabama say : " An uninterrupted adverse possession for twenty years, not only gives a right of possession which cannot be divested by entry, but also *gives a right of entry.* So that if a person who has such a possession is turned out of it, he may lawfully enter and bring an ejectment for its recovery ; upon which he will be entitled to judgment ".

Doe ex. dem. Farmer's Heirs v. Eslava, 11 Ala., 1042, 1043;
Murray v. Hoyle, 92 Ala., 559.

In other words the operation of the statute is the same as a positive grant, by *conferring title* to the land in the adverse holder.

This Court has said : " It is not to be questioned that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice; one of the *most sacred* and important of sovereign rights and duties; and a *restriction* which must *materially affect both legislative* and *judicial independence.*"

Hawkins v. Barney's Lessee, 5 Pet., 466.

When possession of land was acquired within the limits of the territory claimed by the United States, by virtue of the treaties of St. Ildefonso and Paris, whilst Spain exercised *actual* dominion over it, under the defense of the statute of limitations, the possession of land will be dated from the period of its *actual occurrence ;* and not from the date of the act of Congress of 1812, abrogating the

Spanish, and extending the laws of the Mississippi Territory over the country, nor from the date of the actual occupation of the territory by the United States, the succeeding year.

Innerarity v. Mims, 1 Ala., 660, decided in 1840.

When the statute of limitations begins to run, it continues to run notwithstanding any intervening disability to sue.

Grice vs. Jones, 1 Stewart, 254.

In our case the evidence offered by the plaintiff in error, but excluded by the Court as immaterial and irrevelant, tended to show that Regist Bernoudy, through whom the plaintiff in error claims, had possession of the Bernoudy Tract in 1792.

The statute had been running 75 years in favor of Bernoudy and his assignees when the act of January 31, 1867, was passed by the General Assembly of Alabama. Hamilton's Colonial Mobile—page 425.

" Grant or title to lands once made by the Legislature is irrevocable".

Tenet v. Taylor, 9 Cranch, 43, cited by STORY, J., in Wilkinson v. Leland, 2 Pet. 657.

It is there said by the Court : " A grant or a title to lands once made by the legislature is irrevocable, and cannot be re-assumed by any subsequent legislative act ; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government and with the right of the citizens to the free enjoyment of their property lawfully acquired.

We know of no case, in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union".

" In Wilkinson v. Leland, 2 Pet., 657, this Court declare that " the fundamental maxims of a free government seem to require that the rights of personal liberty and *private* property should be held sacred. At least, no court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general expressions of the will of the people."

The importance of these statutes of limitation in the case of the City of Mobile, is attested by CATRON, J., in Pollard v. Hagan, 3

How., 233, decided in 1844, wherein he said, in his dissenting opinion:

"Except the grant to Pollard, the act of 1824 confers the entire title (so far as is known to this Court) of a most valuable portion and a very large portion, of the second city on the Gulf of Mexico, in wealth and population. This act is declared void, in the present case; and the previous decisions of this Court are either directly or in effect, overruled *and the private owners stripped of all title. On this latter point my brethren and I fully agree.*

Can Alabama remedy the evil, and confirm the titles by legislation or patent? I say by patent, because this State, Louisiana, Mississippi and surely Florida, will of necessity, have to adopt some system of giving title, if it is possible to do so, aside from private legislation, as the flowed lands are too extensive and valuable for the latter mode of grant in all instances."

It was subsequent to this opinion that Alabama enacted the law making 20 years' acquiescence on the part of the State a bar to its assertion of any right of entry upon lands adversely held and thus supplied the legislation which perfected all titles on the river front of Mobile.

Independently of statute law, it is settled doctrine that individuals may acquire by prescription against the owner or State, the right to the soil of public waters.

Gould, Waters (3rd Ed.), sec. 37, p. 88.

A "beach" is the shore between high and low water mark.

3 Ency. Law, 2d. Ed., 901.

Title to it can be acquired by adverse possession.

Gould, Waters, (3d. Ed.), sec. 22, p. 49.
Andrew v. Nantasket Beach R. R., 152 Mass., 506.
People v. Canal Appraisers, 33 N. Y., 461, and authorities cited by Gould, Waters, note 3, page 49.

The doctrine of alluvion applies to tide waters.

Gould, Waters, (3d. Ed.), Sec. 155, p. 310.

Notwithstanding the general principle that no time runs against the king, yet a subject may acquire property in the shore by custom or prescription.

Gould, Waters (3d. Ed.), p. 40, n. 5.

And this doctrine is fully recognized in Alabama. In Boulo v. New Orleans R. R. Co. 55 Ala., the place in controversy was a *slip* between two wharves; its western boundary is Commerce Street and on the east it extends into the Mobile river.

55 Ala., 489.

The complainant, Boulo, showed no documentary evidence of title, Chief Justice BRICKELL says, speaking for the Court: "This seems to be conceded by the complainants; but it is noted that they, and those under whom they claim, for more than twenty years, have been in the undisturbed and undisputed possession of the place, under a claim of right. If the fact exist, it is right and just they should be protected in the possession.—Varick v. Corporation of N. Y., 4 John, Ch. 53. The presumptions of the law are in favor of the legality of men's acts; and therefore it attributes a *lawful origin* to long-continued use and enjoyment.—3 Stark, Ev. 1203".

55 Ala., 491.

It was, also, fully recognized by the Supreme Court of Alabama in the case of Farmer's Heirs v. Eslava, 11 Ala., 1028. They say: "But the question arises whether these papers are not admissible for the purpose of showing that Spain asserted a right to the premises in question, or laying a predicate from which it may be presumed that the defendant and those under whom he claims had been in possession of the premises in question for twenty years previous to the institution of this suit, so as to give him a title by prescription. Our predecessors, in Hallett v. Eslava's Heirs, 3 Stew. & P. R., 122, intimated that the evidences of an incomplete claim under Spanish authority should be received for the purpose indicated, though they had not been recorded as the statutes referred to contemplate. It is clear their admission is not inhibited by the letter of the acts of Congress, as they do not deny the validity of the confirmation and patent consequent upon it; but the defence which they intended to aid, concedes to the plaintiff's title the validity which the confirmation and patent can, under the circumstances impart."

11 Ala., 1038, 1039.

The force of Justice CATRON's remark in 1844, cited above, to the effect that private owners (in Mobile) were stript of all title and which he said was the unanimous opinion of the court, and the

effect of the statute of limitations which came into existence by the Code of 1852, is made evident by the history of Mobile, and by comparisons between recent maps of the City and that forming part of the record in this court in the case of Leverich vs. the City of Mobile, before cited (October Term, 1874, No. 2). The history of the City shows that originally Royal Street was the street nearest to the river front parallel to it, and that all but a narrow strip of land of about one hundred and fifty feet eastward has been reclaimed from the river; that this reclaimed land which formerly was under the navigable waters of Mobile River forms the streets called "Water," "Commerce" and "Front" streets, and the levee, and upon which is built the larger and most valuable part of the business section of the City of Mobile.

Hamilton's Colonial Mobile.

On page 134 of that history is shown a map of the City as it was in 1760, and the text shows (pages 135, 137 and 138) that the part marked "quay" is our present Royal Street, now separated from the River by three broad streets and a broader levee, and resultant solid blocks of brick buildings.

Pages 304, 306, 313.

On page 313 it is said "It must be remembered, too, that *not far east of Royal Street was the river bank.*" See, also, Watkins v. Holman, 16 Pet., 25.

1st, 8th, 54th and 58th Specifications of Error.

The action of the Supreme Court of Alabama, violates Section X, Article I, of the Constitution of the United States.

A contract is impaired within the meaning of said section so as to give this Court jurisdiction on a writ of error, to the State Court, When rights acquired under it are impaired by some subsequent statute, which has been upheld or *effect given* to it by the State Court.

Bacon v. Texas, 163 U. S., 216.
Lehigh Water Co v. Easton, 121 U. S., 388.
N. O. Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S., 18.
Central Land Co. v. Ludley, 159 U. S., 103, 109.

The settled judicial construction of the act of January 31, 1867, and of the statute of limitations of the State of Alabama, so far as rights were acquired thereunder by the plaintiff in error, is as much a part of the statute as the act itself, and the change of decision complained of in this proceeding is the same in its effect on plaintiff in error's rights as a repeal or amendment by legislative enactment.

Douglass v. County of Pike, 101 U. S. 677.
Ohio Life Ins. Co. v. Debult, 16 How., 416.

The action of the Supreme Court of Alabama violates, also, the 14th. amendment to the Constitution of the United States.

Proceedings under the statute of 31st. of January, 1867, which, if taken before the adoption of the said amendment, would not have violated the Constitution, taken after the adoption violate the Constitution if prohibited by the amendment.

Kaukauna Co. v. Green Bay & Canal Co., 142 U. S., 254.

This court has unquestioned jurisdiction to revise the action of the Supreme Court of Alabama, as in this case, authorizing the taking of private property without compensation.

Yesler v. Washington Harbor Line Comm'rs. 146 U. S., 655, *ad fin.*

This Court, also, always examines constitutional questions and is not bound to follow construction of State Courts upon statutes and construction of statutes in the matter of contracts alleged to have been impaired.

McCullough v. Virginia, 172 U. S., 109.
Douglass v. Kentucky, 168 U. S., 488, 4th *h. n.*
Orr v. Gilman, 183 U. S. (22 S. C. R. 215).

In Hoboken v. Penn. R. R. Co., 134 U. S., 656, this court did not follow the Court of Errors and Appeals of New Jersey in its judgment rendered between the same parties, or their privies, because, as this court say: "The grants from the *State* of New Jersey under which the defendants (R. R. Co.) claim, respectively, are a complete bar to the recovery sought against them in these suits. The *effect* of these grants was not considered by the Court of Errors and Appeals, in the case of the Hoboken Land and Improvement Company v. Hoboken, 7 Vroom, 540, and they were not elements in that judgment."

124 U. S., 693, 694. Cited in Mr. Smith's brief, p. 46.

And in the case of the Atchison T. &c. R. R. v. Matthews, 174 U. S., 96, this Court say: "This Court is not concluded by the opinion of the Supreme Court of the State. Yick Wo v. Hopkins, 118 U. S., 356, 366. *It forms its own independent judgment as to the scope and purpose of a statute*, while of course leaning to any interpretation which has been placed upon it by the highest court of a state."

174 U. S. Page 100.

It is said in Hardin v. Jordan, by this Court, that a decision of a State Court, affecting *riparian rights*, which is opposed to the entire course of previous decisions in that State, will be disregarded by this Court.

140 U. S., 371, 384.

And in that case this Court disregarded the decision of the Supreme Court of Illinois in a matter of riparian rights in lands fronting upon a lake. This Court regarded the older decisions as *rules of property*.

41st-51st (inclusive) Specifications of Error.

No compensation is allowed the plaintiff in error for the taking of its property, according to the decision of the Supreme Court of Alabama. On the contrary, the plaintiff in error is mulcted in damages.

It has been said by this Court: "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the Courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act; may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals".

Chicago &c. Ry. Co. v. Tompkins, 176 U. S., p. 173.
Monongahela Nav. Co. v. U. S., 148 U. S., 312, 324, &c.

A fortiori when no compensation whatever is provided for.

Access to navigable waters cannot be taken from riparian owners without compensation, except by the United States when in furtherance of navigation.

Scranton v. Wheeler, 179 U. S., 141.

Due process of law means a *fair* trial in a court of justice, according to the modes of proceeding in such cases.

Merchant v. Pennsylvania R. R. Co., 110 U. S., 387.

And when the parties have been *fully* heard, in the regular course of judicial proceedings.

Central Land Co. v. Laidley, 159 U. S., 112.

In this case, which is a *jury case*, as the record shows, all evidence whatsoever offered upon behalf of plaintiff in error, except the map, was excluded—and judgment rendered for the defendant in error upon no evidence upon its part, except general laws of which the court itself would take judicial notice, and which the jury was bound to construe just as the court instructed them.

3 Brick. Dig. p. 408, secs. 23, 24.

Case v. Mayor of Mobile, 30 Ala., 538.

2d, 3d, 4th and 7th Specifications of Error.

Riparian Rights in Alabama.

It was said in Miller v. Cullum, 4 Alabama, 582, decided in 1843: "But suppose the Spanish concession *in totidem verbis* had recognized the mouth of the branch, as the northeast corner of the tract at the time it was surveyed, would it not be admissible to show, that owing to alluvial deposits and other causes, the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot?"

In Hagan v. Campbell, 8 Porter, 33, it is said: "Nor can the fact of a road running along the bank of a navigable river, be held to limit a grant having the river for its boundary, so as to exclude its proprietor from riparian rights; and in this case there cannot be the slightest pretense for such an idea. The freehold in the land

over which the road runs, did not continue in the Spanish Government; that was transferred by the grant, while its use only was to be enjoyed by the public (Cortelyou vs. Van Brundt, 2 Johns. R., 351). And the title to all the soil lying between the original tract and the river, having passed by virtue of the grant of 1807, to John Forbes & Co., and of course to his assignees, they immediately became entitled to the right to alluvial formations, in the same manner as other riparian proprietors are, on navigable streams.

But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

This doctrine is reaffirmed in Hallett v. Hunt, 7 Ala., 882.

In Hagan v. Campbell, 8 Porter, 9, it is said that "Riparian proprietors are entitled to all accessions made, to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand and other substances."

The Court is especially desired to notice that all these cases relate to lands on the river front of Mobile.

See also Boulo v. New Orleans R. R. Co. 55 Ala., 489, before cited, and also Compton v. Hankins, 90 Ala., wherein it is said:

"Riparian owners have claimed and exercised the right to construct wharves and landing places on navigable streams, from the earliest settlement of this country, subject to the limitation, that the public easement or servitude is not impaired. The owner has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public." (Page 414.)

In the case of Pollard's Lessee v. Files, 2 How. 591, this court did not hesitate to reverse the Supreme Court of Alabama, in a case upon a proposition the *exact converse* of that involved in the present case.

In the Files case the Supreme Court of Alabama held that the plaintiffs, Forbes & Co., could recover as riparian owners, against Pollard. This Court reversed the Alabama Court because, as they say, the Spanish grant to Pollard was good, and that Forbes & Co. had no riparian rights in the land, which was a lot *east* of Water Street, because the lot granted to them was on the *west* of Water Street, and was a *city* lot, and therefor Water Street was its boundary on the east (and not the channel of the river).

2 How. 607 (A. D. 1844).

18th-27th (inclusive), 53d Specifications of Error.

There was error in excluding as immaterial and irrelevant the documentary evidence of title offer by the plaintiff in error.

This Court can look into the title in arriving at the conclusion as to whether the national constitution has been violated or not.

It is said by this Court in Martin v. Hunter's Lessee, 1 Wheat., 357: "The objection urged at the bar is, that this Court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals". 357.

"How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessities of the case, there must be a preliminary inquiry into the existence and structure of the title, before the Court can construe the Treaty in reference to that title. If the court below should decide, that the title was bad, and, therefore, not protected by the Treaty, must not this court have a power to decide the title to be good and, therefore, protected by the Treaty?"

P. 358, STORY, J.
Cites Smith v. State of Maryland, 6 Cranch, 286.

"It is equally clear that, the *title* is the primary object to which the attention of the court is called in every such case. The words are, 'and the decision be against *the title*', so set up, not against *the construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state court to the contrary, and in that case the party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of these very errors, partialities, or defects in state jurisprudence against which the constitution intended to protect the individual."

JOHNSON, J., pp. 369, 379.

In Smith v. Maryland, 6 Cranch, 291, Johnson arguendo says, p. 291: "It is for this Court to decide whether the construction which the Maryland courts have given to their acts of the Assembly, be *consistent* with the true construction of these treaties."

The Court by WASHINGTON J., p. 304, say: "This argument proves nothing more that that the whole difficulty in this case

depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious *so soon as that construction is settled.*"

21st 22d & 53d Specifications of Error.

The court erred in excluding from evidence the Treaty with Spain, of February 22, 1819, and especielly the 8th. Article of said Treaty.

" Under the 8th. Article of the Treaty between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252), the title to lands which had been granted by the King of Spain was confirmed by force of the instrument itself."

United States v. Perchenian, 7 Peters, 81, 82.

This article does not avoid *surveys* made after 24th January, 1818, to locate grants made before that time, although such grants contained no description of the plan where they were to be located.

United States v. Domingacosta, 1 How., 24.

The volumes of State Papers are evidence to establish a chain of title to land.

Watkins v. Holman, 16 Pet. 55, 56.
Hall v. Doe ex dem. Root, 19 Ala., 386, 388, 391, 396-9.
Cited in Mr. Smith's brief, p. 6*a*.
Stewart v. Trenier, 49 Ala., 492.
Trenier v. Stewart, 55 Ala., 558.
Ballard v. Greit, 3 Ala., 932 (cited in Mr. Smith's brief, p. 17).

5th, 11th, 13th, 14th, 55th, 57th Specifications of error.

In Alabama the courts have never held that the State owned the soil under navigable waters in fee, but only as a trust for the purposes of navigation.

We have before cited Kemp v. Pollard, 3 Ala., 294, where that court say: " What is said by the court of a *property* in the shore passing to the State, upon its admission into the Union, cannot when

fairly interpreted, be understood to mean the *absolute ownership*, but merely the right of *jurisdiction* and *control*".

In confirmation of the doctrine as laid down in 3 Ala., 294, we have ths exposition of the Supreme Court as to the character of the rights that the State of Alabama reserved, upon being admitted into the Union, over the navigable waters, in the case of the city of Mobile v. Eslava, 9 Porter, 577. On page 597 they say: "By the act of Congress of March 1803, 'regulating the grants of land providing for the disposal of lands of the United States south of the State of Tennessee', it is enacted that all navigable rivers within the territory of the United States, south of the State of Tennessee, shall be deemed to be and remain public highways. And all the laws in regard to the establishment of territorial governments by Congress, and the survey and disposal of the public lands, whether of an earlier or later date, contain similar provisions". * *

"In the last proviso of the 6th. section of the act of 1819, 'to enable the people of the Alabama territory to form a Constitution and State government, and for the admission of such state into the Union, on an equal footing with the original states', among the propositions submitted by Congress to the Convention, for their acceptance or rejection, it is declared, that 'all navigable waters within the said state, shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost or toll therefor, imposed by the state'. By the ordinance which makes a part of the Constitution of Alabama, the 'convention for and in behalf of the people inhabiting this State, do accept the propositions offered by the act of congress, under which they are assembled." p. 598.

Page 599: "Without speculating further upon the intention of Congress, to be gathered from its enactments previous to 1819, we think it sufficiently appears from the act of that year, authorizing the formation of a State Constitution, that the United States proposed to relinqish its right to the 'navigable waters' within this state, upon an *agreement* by the convention, that they should 'forever remain *public highways*, free to the citizens of said state, and of the United States, without any tax, duty, impost or toll therefor, imposed by said state'. The proposition for that purpose is thus introduced by congress: 'Sec. 6. That the following be, and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection,

which, if accepted by the convention, shall be obligatory upon the United States'. The convention, we have already shown, accepted all the propositions submitted to it, *and thus perfected the stipulation between the state and federal governments*". p. 599.

These cases decide that, when the State was admitted into the Union, it agreed never to treat the navigable waters of the State as its property, never to claim absolute ownership of them, but merely to assert the right of jurisdiction and control over them.

This agreement is as binding upon the State as any other contract.

Stearns v. Minnesota, 179 U. S., 223, 240, 243, 244, 245, 253.

But if the State has no absolute property in the river at Mobile, and no absolute ownership, it cannot invest the City of Mobile with a title it has not itself. The Act of 1867, if not in violation of the State Constitution, violates the agreement with the United States, and violates the Constitution of the United States, by impairing the obligation of a contract.

In Abbott v. Kennedy, the Alabama Supreme Court say: "The State only claims property in the shore as the *representative* of the *public* for the purposes entirely conservative of the usufruct therein, *never* destructive of it."

"This being the case it would seem necessarily to follow that the sovereign power *can make no disposition of the shore by grant or otherwise* prejudicial to the rights of those for whom it holds it in trust."

Abbott v. Kennedy, 5 Ala., 395.

As before shown in this brief the same doctrine was held by the Alabama Court in the case of Mobile v. Moog, 53 Ala., 561, where the Court construed the act of January 31, 1867, as conferring only a right to regulate the use of the shore, if valid for any purpose whatever.

This doctrine has prevailed in Alabama as a rule of property, therefore, so long as to create settled rights, which cannot now be arbitrarily wrested from the citizen without compensation. The citizen had a right to purchase water fronts in Alabama and to erect wharves thereon and to fill in the low ground approaching such wharves, without which filling the wharves would be useless, relying upon the express declaration of the Supreme Court that the State reserved to itself no other rights over the soil of

navigable waters than those necessary to protect the navigation of such rivers.

The foregoing view of the character of the State's ownership of land under water is in accordance with those expressed by Mr. Justice BRADLEY in Stockton vs. Baltimore & N. Y. R. Co., 32 Fed., 20, cited with approval by this Court in Scranton vs. Wheeler, 179 U. S., 141. Justice BRADLEY says, that the character of the title or ownership by which the State holds the State House is quite different from that by which it holds the land under navigable waters in and around its territory"; (page 19), which is the same as saying the State does not hold land under navigable water in fee.

In Illinois Central R. R. Co. v. Illinois, 146 U. S., 387, this court said that the state's ownership of land under navigable waters is not in fee simple.

146 U. S., 452.

The language of this Court in that case, is: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged land; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is the grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged

cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state".

In *Illinois vs. Illinois Central R. R. Co.*, this Court say: "The title to submerged land resting in the state is held in trust in aid of navigation. * * * It does not comport with our sense of duty in the protection of a mere naked title to submerged land to deny a conceded riparian right—conceded, because so conceded by the ultimate tribunal, when that bare legal title is held in trust for the very purpose to which these structures are devoted—viz., the accommodation of the commerce of the lake."

184 U. S. (22 S. C. R., 306).

Judge DAVIES, in People vs. Canal Appraisers, 33 N. Y., 500, pronounces "dangerous" the proposition that the state can vest the fee of a navigable stream in a private owner, assuming that the estate of the state was that *in fee*, as if absolute owner, when it is only a trustee.

And this court say in Pollard vs. Hagan, 3 How., 212. The State's right of sovereignty and jurisdiction over navigable waters are not governed as it prevailed in the colonies before the revolution, but as modified by our own institutions.

And Judge CATRON said in the same case: "Alabama has only political jurisdiction over the thing, and it must be admitted that subject cannot be the subject of a private grant."

3 How. 235.

It was said in the leading case in Massachusetts of Commonwealth v. Alger, "Principles of usage and adoption relating to shore modify the common law".

7 Cush, 67, 74, 76, 79.

In this case the laws introduced in evidence by the defendant in error show that the effect of this judgment of the Supreme Court of Alabama is to confirm grants of the soil under the navigable waters of this State to private individuals, and to confer estates in fee in such soil upon such individuals, with right of exclusive, actual possession. (Trans. p. 45).

The second section of the act of February 18, 1895, so introduced in evidence enacts: "Sec. 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or

persons, as it may think proper, upon such terms as may seem best to it, for the ascertainment, location, and recovery of any part, or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so, *convey to such person, or persons, an interest in said property, and rights, as compensation* for his, or their, services in such matters."

Pamph. Acts Ala. 1894–5, p. 816.

And the corresponding section of the same act of December 5, 1896, enacts:

SECTION 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it and may, if it thinks proper to do so, *convey to such person or persons an interest in said property*, and rights, *as compensation* for his or their services in such matters."

Pamph. Acts Ala. 1896–7, p. 50.

Both of said sections authorize the City to grant the soil under navigable waters of the State to lawyers as payment of their fees.

That such is the view of the learned counsel for defendant in error is shown by his remarks on pages 35 and 36 of his brief, commenting upon the opinion of the United States District Judge, TOULMIN, as reported in 110 Fed., 186, where he says: "The learned judge wholly ignores the second act of December 5, 1896, which vested the absolute and unqualified title in the City. (See record, page 48.)"

It is forcibly said in a leading New Jersey case: "The sovereign power itself, therefore, cannot consistently with the law of nature, and the constitution of a well ordered society, made a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people".

Arnold v. Mundy, 1 Halsted, N. J., 1, 10 Am. Dec. 356.

It was further said by this court in the case of Illinois Cent. R. R. Co. v. Illinois: "But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor

or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more comfortable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters they cannot be placed entirely beyond the direction and control of the state."

146 U. S., pp. 452, 453.

The mischiefs which arise from rulings like this of the Alabama Supreme Court complained of are clearly shown by Justice MITCHELL, in Lamprey v. State, 52 Minn., 181, 197, cited in Murphy v. Kirwan, 103 Fed. Rep., 104, as follows:

"The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions and relictions, are self-evident, and have frequently been animadverted on by the courts. These considerations apply to riparian ownership on lakes as well as streams. * * * * * * * * * * * * * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The *endless litigation over the location of the original water lines*, and the *grievous practical injustice to the owners of the original riparian estate* that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine."

Even if the State of Alabama had the fee of the soil under its navigable waters, the same as an individual citizen, yet that fact would not vest it with such an estate as would give it the right to bring suit in ejectment for it, against the riparian owner, or any other person having right to use the waters for purposes of commerce and navigation.

It has been held that if the owner of a tract of land dedicated it to the public use for the convenience and accommodation of the inhabitants of a city, the owner or his representative cannot maintain an action of ejectment to recover possession of it.

To constitute such dedication the legal title need not pass from its owner, nor is it necessary that any grantee of the use should be in existence.

> Cincinnati v. Lessee of White, 6 Peters, 431. Examined and affirmed in New Orleans v. United States, 10 Pet., 713.

"Dedications of land for public purposes have frequently come under the consideration of this Court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; *applying to them the rule which prevails in private grants*, that there must be a grantee as well as a grantor.

But *that is not the light in which this Court has considered such dedications for public use*".

"It was admitted at the bar, that dedications of land for charitable and religious purposes, and for *public highways*, were valid without any grantee to whom the fee could be conveyed" *Id*, 435.

Citing &c.

Beatty v. Kentz, 2 Pet. 566;
Town of Pawlet v. Clark, 9 Cranch. 292.
M'Connell v. Lexington, 12 Wheat. 582;
Jarvis v. Dean, 3 Bing. 447.

"But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court, in the fourth instruction asked by the plaintiff. * * * * * * * * * * * *"

"We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment."

"This is a possessory action, and the plaintiff, to entitle himself to recover, must have *the right of possession*: and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32. Starkie, part 4, 506, 507."

"This is the rule laid down by Lord MANSFIELD in Atkins v. Horde, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of Doe v. Staple, 2 Durn. and East, 684, it was held, that although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title,

but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of Doe v. Jackson, 2 Dowl. and Ryl., 523, BAILEY, Justice, says, 'an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover'."

"If then it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong doers; it is difficult to perceive on what grounds this action can be sustained".

"But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff."

"The purpose for which the action is brought, is not to try the *mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right.* That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of this action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice SMITH in the case of Stiles v. Curtis that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias* possession of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

"It is said in the case in Burrow, that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right."

City of Cincinnati v. White's Lessee, 6 Pet., 441-444.

A proprietor of land who has dedicated the land as a public way, cannot recover possession of it, in an action of ejectment, although the legal title to the same remains in him.

Barclay v. Howell's Lessee, 6 Pet., 498.

The same doctrine has always been held in Alabama.

The case of Kennedy v. Jones, which was an action at law, states the law to be that in *ejectment* the plaintiff must have the right of possession as well as the fee.

11 Ala., 86.

And this case has never been overruled. It has been the rule long enough before the judgment herein complained of to be considered a rule of property.

Cofer v. Schening, 98 Ala., 338, 341.

We can say, too, of the Supreme Court of Alabama that the record shows that it did not consider the rights of the plaintiff in error as grantee under a Spanish grant and under the provision of the Treaty with Spain of 1819.

It can be said of it, as was said by this Court of the Court of Errors and Appeals in New Jersey: "The effects of these grants was not considered or determined by the Court of Errors and Appeals of New Jersey in the case of Hoboken Land &c. Co. v. Hoboken, 7 Vroom, 540, and they were not elements in that judgment."

Hoboken v. Penn. R. R. Co., 124 U. S., 693.

And this Court disregarded the rulings of the New Jersey court upon the identical point involved in the other case, decided by the New Jersey Court.

6th., 9th., 12th., 16th., 17th., 56th. Specifications of Error.

The act of Alabama of January 31, 1867, is clearly void because unconstitutional.

The title of the act does not describe its subject as required by Section 2 of Article four of the constitution of Alabama of 1865.

The title is "Granting to the City of Mobile the *Riparian* rights in the river front". What are riparian rights? They are not "shores" or "soil". They are simply *easements*. They are defined as "such as *follow* or are connected with the *ownership of the banks* of streams or rivers". 21 Am. and Eng. Ency. Law (1st Ed.), p. 411.

The body of the act, however, purports to grant and deliver to the City of Mobile "*the shore and soil under Mobile river*, situated within the boundary lines of the City of Mobile, &c". A grant of the *rights* connected with the ownership of the banks of Mobile river is not the same as a grant of the shore and soil under Mobile river, any more than a grant of the right to use an alley-way is not the same as the grant of the alley-way itself.

Hence, it is clear, that the title to the Act of January 31st., 1867, does not describe the subject of it, and the act is unconstitutional.

Ex-parte Pollard, 40 Ala., p. 77.
Weaver vs. Lapsley, 43 Ala., p. 224.
Walker vs. State, 49 *Id.*, p. 329.

No one could infer from the title of the Act, that its purpose was to grant the fee of any land to the City of Mobile. The subject of the title is confined to "riparian rights", which are uses and easements, and nothing more. The "shore and soil" under Mobile river are the things themselves to which riparian rights are only *appendages*. As before said the difference between the subject of the title of the act and that of the body of the act, is as great in degree as would be the difference between the subject of the title of an act purporting to grant to the City of Mobile the use of an alley-way, and that of the body of an act granting to said city the land itself upon which the alley-way is located.

This Court will decide for itself the constitutionality of a state statute whenever the statute itself is directly involved in the case, on writ of error.

Hoboken v. Penn. R. R. Co., 124 U. S., 656, 687.

The identical constitutional point involved in that Hoboken case is involved in this. The State constitution in force when the act of January 31, 1867, was passed was that of 1865.

Section 2, article 4, of that constitution ordains "each law shall embrace but one subject which *shall be described in the title.*"

Code Ala., 1876, p. 91.

9th and 15th Specifications of Error.

Moreover if the law of 1867 was ever a valid law all grants under it to the City of Mobile were revoked absolutely or vested in the trustee for the bondholders of the City of Mobile.

In 1879, the general assembly passed the act entitled "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation". Approved Feby. 11, 1879. Pamph. Acts Ala., 1878-79 p. 381.

Section 2 of said act provides for appointment of commissioners by the Governor.

Section 3 provides that said commissioners "shall at once enter upon and take possession of all the property, real and personal, which prior to the passage of this act, belonged to the Mayor, Aldermen and Common Council of Mobile" &c.

Section 7 provides that the Chancery Court of Mobile shall take jurisdiction of the application of the assets of the Mayor, Aldermen, &c., and proceed therein and administer said assets for the benefit of the parties entitled thereto as trust estate under the rules which obtain in said court in such cases as to parties necessary and proper, &c.

Section 8 provides that said commissioners and receivers shall take, hold and possess all the property real and personal, &c. upon the same trust and subject to the same charges, liens and duties as if the same were in the possession of said corporation.

Section 17 provides that the act shall go into effect from and after its passage.

On February 11th, 1879, the General Assembly passed the act

" To incorporate the Port of Mobile and to provide for the government thereof," Pamph. Acts Ala., 1878–9, p. 392.

The first section of the act established the boundaries of the new city, and comparison with the act of Feb. 2d, 1866, referred to in the act of January, 1867, shows that they are *entirely different* from the old boundaries.

Very large portions of the southern, western and northern parts of the extinguished City of Mobile, were excluded from the limits of the new Port of Mobile.

The 37th section of said act repeals all laws and parts of laws in conflict with its provisions.

Dec. 8th, 1880, the General Assembly enacted the act entitled " An Act to adopt and carry into effect the plan &c." Pamph. Acts Ala., 1880-81, p. 329. The preamble to this act recites " Whereas the municipal corporation of this state known as the Mayor, Aldermen and Common Council of the City of Mobile was *dissolved* and its *charter vacated* and annulled, *its assets were placed under the jurisdiction, supervision and direction of the Court of Chancery* for the first district of the Southern Chancery Division of this State, &c."

This shows that the legislative purpose of the two acts of February 11th, 1879, was to *completely obliterate* the old City of Mobile and put *all* of its assets in the hands of the commissioners of the bondholders.

Said act of Dec. 8th, 1880, provides in section 32, for an agent or trustee to succeed the commissioners originally appointed by the governor, and in section 33 provides that "said commissioners shall also transfer and deliver to said agent or trustee *all the property, real and personal*, held by them as such commissioners, and whose disposition is not otherwise provided for in this act, the same shall be held by such agent or trustee upon the trusts that such property was charged within the hands of such commissioners." Pamph. Acts Ala., 1880-81, p. 357.

The only property " otherwise provided for " in said act was the wharves, which were placed under the control of a distinct officer, denominated Superintendent of Wharves.

The State had a right to annul the charter of Mobile and destroy the corporation.

1 Dillon Mun. Corp. (4th Ed.) Secs. 86, 87, 88, 91.
Cooley Const. Lim. (4th Ed.) Secs. 231, 232, 233.

Mt. Pleasant vs. Beckwith, 100 U. S., pp. 525, 526, 528, 530.
New Orleans v. N. O. Waterworks Co., 142 U. S., pp. 79, 89.

There is no connection between the old corporation and the new, and the old corporation has no claim upon public property within the boundaries of the new.

Mt. Pleasant vs. Beckwith, 100 U. S., p. 524.

The foregoing shows that, if ever the act of January 31st, 1867, were valid, all estate vested by it in the old City of Mobile has been withdrawn and is now in the trustee of the bondholders.

The General Assembly had the power to do this.

Illinois Cent. R. R. Co. v. Illinois, 146 U. S., pp. 452, 453, 454, 455, 456, 457, 458, 459, 460, 463.

It was contended in the court below that the property covered by the act of January 31st, 1867, did not pass to the commissioners and trustee under the acts of February 11th, 1879, and December 8th, 1880, before referred to. It was not pointed out in what part of said acts the exception was made which took such property out from under the sweeping grants of the acts aforesaid. But, granted, for argument's sake, this property was so excepted, and became vested in the Port of Mobile and its successor the City of Mobile created by the act "To amend an act entitled an act to incorporate the Port of Mobile, &c.," approved Dec. 10th, 1886. Pamph. Acts Ala., 1886-7, p. 223, and acts amendatory thereof, nevertheless all of these acts incorporating the Port of Mobile and City of Mobile were repealed absolutely by the act "To provide a charter for the City of Mobile", approved February 6th, 1897, Pamph. Acts Ala., 1896-97, p. 542.

This act creates a corporation *de novo*, with new boundaries, different from those of the old city of Mobile, of the port of Mobile, and of the successor of the port of Mobile. It added to the area of the southern part of the preceding city, and cut off from its eastern part all of that lying east of Mobile river known as Blakeley Island. (See Section 1.) The new city is a different geographical entity from any of the previous corporations.

Section 53 of this act of February 6th, 1897, repeals all laws and parts of laws in conflict with this act.

Pamph. Acts Ala., 1896-97, p. 581.

Besides the act of January 31st, 1867, and February 18th, 1895, the defendant in error was allowed to introduce as evidence to the jury the "act to amend an act entitled 'An Act to fix the right of the City of Mobile to certain real estate', approved February 18th, 1895," approved December 5th, 1896.

But this act of December 5th, 1896, was repealed by the later act of February 6th, 1897.

The legislature could do this.

Cooley Const. Lim. (4th Ed.), Secs. 231, 232, 233.
Mt. Pleasant vs. Beckwith, 100 U. S., pp. 525, 526, 528, 530.
1 Dillon Mun. Corp. (4th Ed.) Secs. 86, 87, 88, 91.
Illinois Cent. R. R. Co. vs. Illinois, 146 U. S., 452, 455, 460, 463,

wherein this Court say: "Any grant of the kind is necessarily revocable and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure or for its business, in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated."

It was proved that the land described in the complaint is in the *present* city of Mobile. (Testimony of John Hogan, Trans. p. 74).

The preamble of the Act of December 8, 1880, before referred to, recites that the City of Mobile as it existed under the charter of 1866, which was in force January 31, 1867, was dissolved and its charter vacated and annulled, and its assets were placed under the jurisdiction, supervision and direction of the court of chancery for the First District of the Southern Chancery Division of this State.

"The recital in the preamble of a public act of parliament of a public fact is evidence to prove the existence of that fact. Rex vs. Sutton, 4 Maule & Selwyn, 532; Starkie on Evidence, 197."

Watkins v. Holman, 16 Peters, 55.

52 Specification of Error.

ESTOPPEL.

The tax lists and tax receipts offered in evidence by appellant and excluded were relevant to show, that for more than twenty years after the passage of the act of January 31st, 1867, continuously, the City of Mobile had been assessing the property described in the complaint against the appellant and those through whom it claims, up to the time of commencing this suit.

The tax lists show that the City of Mobile stood by and allowed the appellant to purchase the land sued for and the land of Barnewall and Hogan, as it had itself declared it to be by its assessments for more than thirty years.

A plaintiff may be estopped, in ejectment, from asserting his legal title.

1 Brick. Dig. p. 627, Sec. 33.
Mitchell v. Robertson, 15 Ala., p. 412.
7 Am. and Eng. Ency. Law, (2d. Ed) p. 19.
Dickerson vs. Colgrove, 100 U. S., p. 578.
Kirke vs. Hamilton, 102 U. S., pp. 68, 77, 78.
Drexel vs. Berney, 122 U. S., p. 253.

Sec. 25 of the "Act to consolidate the several Acts of Incorporation of the City of Mobile, and to alter and amend the same", approved February 2d, 1866, introduced in evidence by the defendant in error, enacts that there shall be an officer called the City Tax Assessor, whose duties are defined as follows: "the said assessor shall make an assessment of all the property in said City of Mobile to be assessed," &c. Transcript, p. 20.

Such assessment is a matter of *record* and a *record of declaration* that the property assessed is not city property, made by the city's agent, duly authorized to ascertain the fact. The tax lists offered in evidence by the plaintiff in error and excluded were relevant, in estoppel. The Supreme Court of Alabama has never held that estoppel of the plaintiff may not be shown in an action of ejectment when the estoppel is by a record. Its decisions are in harmony with those of this Court. Sovereign states, even, may be barred by estoppel arising from conduct.

Indiana vs. Kentucky, 136 U. S. 509.

In the case of Brewton v. Spira, 106 Ala., 229, the Supreme Court of Alabama directly hold that the doctrine of estoppel applies to municipal corporations.

They adopt the declarations of this Court in Zabriskie vs. R. R. Co., 23 How., 381, as their rule, saying: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representatives or *silence*, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced".

106 Ala., 236.

CONCLUSION.

In his opinion Judge TYSON gives as a reason for the distinction made between this case and the case of Webb v. Demopolis, 95 Ala., that the latter case referred to a portion of the stream above the ebb and flow of tide water, and that the present case is within the ebb and flow of tide water, and, therefore, within the influence of a different rule.

Trans. p. 107.

This distinction made by Judge TYSON between the portion of the Alabama River at Demopolis and that at Mobile, is based upon a revival of the old exploded test of the ebb and flow of tide as the distinguishing mark of a navigable river.

The reports of this Court beginning with the case of "The Thomas Jefferson", 10 Wheat., 428, which is overruled by the case of "The Genesee Chief", 12 How., 244, illustrate the progress of this Court from the acceptance of this test of navigability based upon the ebb and flow of tide, to absolute abandonment, brought about by the recognition of the absurdities, contradictions and mischiefs it led to.

In the case of Peyroux v. Howard, 7 Peters, 343, cited in the brief in support of the doctrine that this Court will judicially notice the geographical location of places for the purpose of determining whether the tide ebbs and flows at that place, and will take cognizance of standard works relating to the territory involved in the case, this Court was still hampered by the doctrine that the ebb and flow of the tide was the only test of navigability, and took judicial notice of a tide at New Orleans, which this Court, twenty-

four years afterwards, described as an evasion of the question by a judicial notice of an occult tide without ebb and flow.

Jackson v. Steamboat Magnolia, 20 How., 302.

The briefs of counsel on both sides in the case of Peyroux v. Howard, show that as a matter of fact the conditions at New Orleans were exactly like those at Mobile, and that had the decision in 7 Howard been rendered today the question of ebb and flow of tide would have had no consideration, whatsoever, by the Court.

In Peyroux's case, in the argument of the appellant, page 330, it is said: "It is by no means conceded that New Orleans is within the ebb and flow of the tide; on the contrary, that the Court will notice the notorious and historical fact that it is beyond the ebb and flow of the tide; that the Missippi River is not an arm of the sea, nor an inlet from the ocean, but an inland river, whose current assumes but one course or flux to the ocean, and is uninfluenced by its tides." Citing beside law reports, Malte Brun's Geography, Vol. 5, p. 58, book 79, ed. of 1826; and Stoddard's Louisiana, 164, ch. 4. * * *

"'The tide is not felt at New Orleans. The rise and fall of the river is caused exclusively by the rainy and dry season in the interior; at low water the flow to the sea is scarcely perceptible.' From the surveyor general of Louisiana. Hall's Travels, vol. 2, 284."

"The tides have little effect upon the water at New Orleans. They 'sometimes' cause it to 'swell' but never to 'slacken its current.' Stoddard's Louisiana, 164, ch. 4."

In the argument for the appellee, in reply to these facts urged by the appellant, Mr. Livingston could only reply:

"If it should be objected that the fact of New Orleans being within the ebb and flow of the sea is not in evidence, the answer is, that there are notorious facts with which courts are supposed to be conversant, and of which they will take notice without further proof. Thus, in the case of La Vengeance, 3 Dall. 297, 1 Peter's Cond. Rep. 132, the court takes official notice of the situation of Sandy Hook; and in the case from 20 Johnson, cited by the defendant, they assume, in like manner, that Salmon river is a fresh water river, and that it has no flux and reflux. In the case before the court, there is moreover the evidence of a public act, making New Orleans a port of entry and delivery."

This is the only reply and citation of facts in opposition to the appellant's evidence.

No wonder this Court in Jackson v. Steamboat Magnolia, as above cited, said: "We could no longer evade the question by a judicial notice of an *occult tide without ebb or flow*, as in the case of Peyroux v. Howard (7 Pet., 343)". 20 How., 302.

It is very clear that the court, in order to reach a desired conclusion, in the case in 7 Peters, created for the purpose "an occult tide without ebb or flow," something unknown to the courts of England,—a country throughout whose whole extent the tides vary in many cases a score of feet, and are always visible; always with ebb and flow; and always to be predicted with the same certainty that attends the prediction of the movements of the sun and moon.

So, in this case, the Alabama judge has created an occult tide without ebb or flow for the purposes of this case.

As was said by Justice GRIER in Jackson v. Steamboat Magnolia, 20 How., 302, of the decision in the case of Peyroux v. Howard, 7 Peters 343, this decision of Judge TYSON establishes an "arbitrary distinction" which, when applied to the Mobile River, has "no foundation in reason."

By the present litigation the owners of the river front of the City of Mobile have been disquieted for the third time in the history of the City, and their title to their property made insecure.

The first time was when this Court by the decision of 3 Howard, 212, Pollard's Lessee v. Hagan, overruled five previous decisions of this Court. (17 Par. Original Bill, Mayor &c. Mobile v. Leverich, October Term, 1874, No. 2.) The mischiefs of that decision were intelligently described by Judge CATRON in his able dissenting opinion. He says in that: "The front of the City of Mobile is claimed by the act of 1824, sanctioned by this Court as a valid grant in the five cases of Pollard v. Kibbe, 14 Peters; of the City of Mobile v. Eslava, 16 Peters, 234; of the same plaintiff against Hallett, 16 Peters, 261; of the same plaintiff against Emanuel, 1 How., 95; and of Pollard v. Files, 2 How., 591. Except the grant to Pollard, the act of 1824 confers the entire title, (so far as is known to this Court), of a most valuable portion and a very large portion of the second city on the Gulf of Mexico in wealth and population. This act is declared void in the present case; and the previous decisions of this Court are, either directly or in effect, overthrown; and the private owners stripped of all

title. On this latter point, my brethren and I fully agree: Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will, of necessity, have to adopt some system of giving title, if it is possible to do so, aside from private legislation, as the flowed lands are too extensive and valuable for the latter mode of grant in all instances."

The threatened mischiefs of this judgment so forcibly described by Judge CATRON were finally averted by the adoption of the Code of 1852, which put up a bar of twenty years against the State in actions for the recovery of lands, as is fully shown in the brief. But before the bar of that statute had become complete, the second attack upon the owners of the river front was made by the passage of the legislature of Alabama of the act of January 31, 1867, the subject of this writ of error, in which, under a caption granting riparian rights to the City of Mobile, there followed a section granting the soil and shore under the navigable waters of Mobile River, within the lines of the City of Mobile, to that City.

This at once received a quietus for the time being by the decision in the case of Leverich v. The City of Mobile, in the United States Circuit Court, at Mobile, in 1872. That Court perpetually enjoined the City from making any claim whatever to the wharves in front of the City. This decree covered, by its terms, the whole of the then used river front of the City.

110 Fed. Rep., 170.

A quarter of a century later, when the City had outgrown the *actual (though not the charter)* limits which existed at the time of the decree in the Leverich case, the present attack, the third of the series, was made, which is the cause of the present appeal to this Court. An inspection of the record will show this Court that this attack is as serious and as far reaching as the two which preceded it.

Four propositions have been established by the decision of the Supreme Court of Alabama now before this Court on this writ of error, each involving a federal question.

The first is, that it is sufficient for a complaint to be made in the name of the City, alleging that the lands sued for extend to the channel of the river, with descriptions of boundaries running as far back shoreward as the pleader may choose to allege, and no evidence need be adduced by the City to sustain the complaint, and no evidence of title will be permitted to be adduced by the defendant.

as to any part of the land within the descriptions of the complaint, to disprove the allegations of the complaint, to show whether or not it is alluvion or accretion, or above high water mark, or whether or not it is beyond state interference as a Spanish Grant.

Record pages 10, 75, 76.

The second is, that no time runs against the City, and that there is no prescription, whatsoever, in favor of the citizen—the property owner, notwithstanding the bar against the State has been perfected under the statute of limitations.

Record page 109.

The third is, that a grant by the State includes land below what was high water mark in 1867, including accretions, and that the City can recover all such lands under this grant, notwithstanding they may be accretions or alluvion, or beyond State control as Spanish Grants.

Record page 110.

Judge TYSON says that, "The defendant, however, insists that its third charge, limiting the plaintiff's right to recover the land 'covered by the description in the complaint which is not now below high water mark', should have been given. The argument is, that the description in the complaint takes the western line far inland. That means west of high water line. We do not find this the fact. The description distinctly limits the western line southerly, 'along the high water mark', which would necessarily limit the line to the high tide. *Besides the charge limits the recovery to the present high tide line which might be different from what it was when the grant was made* or the suit commenced."

This argument is made by the Court in the face of the fact that all the evidence was excluded offered by the defendant, and also in face of the fact well known to the Court, and of which the Court will take judicial notice, that the rivers in the great south and western and southwestern portions of this country are ever swaying backward and forward in their valleys, eating out on one side and building up on the other, and that, as a matter of fact, there is no such thing as a stable, permanent line of river bank along any of the great American rivers.

The fourth proposition is clearly implied from the other three, viz: That the State owns all the soil of the City of Mobile between

Royal Street, the high water line in 1819, and the line of high water mark as it was in 1867, and can cause all the present occupants of that territory to be ousted without compensation for their improvements, worth millions of dollars, by granting it to the City.

As Judge CATRON says, all owners of lands in the business part of the City are without title, and as a result they may be despoiled of their property without compensation, if the decision in the Transportation Company case is to stand, whenever the legislature of Alabama sees proper to deprive them of their property. A decision so full of present injustice, and so pregnant with probable and possible mischief in the future, cannot but fall within the ban of the fourteenth amendment of the Constitution, as well as of the clause which forbids the impairment of contractual obligations.

Most assuredly the intelligent people of the second City on the Gulf, and in the matter of fruit importation, lumber export, and trade with Cuba, the second City in the United States, would not have spent their millions in building structures upon land, the title to which vested in the State.

This Court knows that it is the common practice of purchasers of lands to have titles examined by lawyers, and have opinions given by such lawyers, before buying. If these titles were as defective as the judgment complained of makes them, is it reasonable to believe that this fact could have escaped the notice of the bar of Mobile for more than eighty years? Does not the fact that the people of Mobile have been building with confidence upon all this land, show that the best legal opinion of most lawyers held otherwise? We think it does, and that this concensus of opinion outweighs the opinion of the single judge who was the author of the opinion in this record.

The practice of the Supreme Court of Alabama is to refer each case to a single judge. The records are not printed as in this Court, and, therefore, only one judge reads the record in each case, and he is the judge to whom it happens, in the numerical order of submission, to have the record assigned,—the five judges having each his fixed number. These causes are so numerous that no judge has time to read any other records than those personally assigned to him.

Even petitions for rehearing are always referred to the judge delivering the opinion sought to be revised, and he alone decides whether or not there is a probability that he has made some error.

In the majority of cases this system has produced substantial

justice, but occasionally cases come up, like the present one, so momentous in consequences as to merit the consideration of every member on a bench of judges. Such consideration this case can only have in this Court. Fortunately, the action is one in ejectment, and there is nothing in the decree of the Alabama Court that is binding upon this Court, and this Court can re-examine the whole case untrammelled by the rulings of the State Court.

The record in this cause furnishes evidence to suggest the origin of this third attack upon the owners of the river front of the City of Mobile.

The transcript of the record, page 45, shows that the defendant in error at the trial offered in evidence the act approved February 18, 1895, to be found in the Acts of the General Assembly of Alabama, of 1894-95, page 815, entitled "An Act to fix the right of the city of Mobile to certain real estate".

The language of this act is as follows, viz:

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the absolute and unconditional title and right to all real estate, rights, and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the board of aldermen and common council of the city of Mobile, or in the Port of Mobile, or in the present city of Mobile, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled, and disposed of, as to it may seem best.

SEC. 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or persons, as it may think proper, upon such terms as may seem best to it, for the ascertainment, location, and recovery of any part, or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so, convey to such person, or persons, an interest in said property, and rights, as compensation for his, or their services in such matters."

The second section of this act shows on its face that there was some individual behind its passage with a scheme out of which he was to derive personal advantage, inasmuch as that section authorizes the City to "contract with such person, or persons, as it may think proper, and upon such terms as may seem best to it, for the recovery of any part, or the whole, of such property, and the rights

hereby vested in it, and may, if it thinks proper to do so, *convey* to such person, or persons, an interest in said property, and rights, as compensation for his, or their, services in such matters."

The same page of the same record shows that this act purported to be amended on the 5th. of December 1896, as follows, viz :

"SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled "An act to fix the right of the city of Mobile to certain real estate', approved February 18th, 1895, be, and the same is hereby, amended so as to read as follows : Section 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, right and easements, pertaining or incidental to any real estate, or any rights therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SECTION 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters."

A comparison of the two acts shows that there was substantially no amendment made, but the purpose was simply to get a re-enactment of the confirmation of the contract subsequently to the new charter.

The record also shows, on page 41, that the attorneys representing the City are not the City's attorney, as provided by law. The record shows that B. B. Boone, Esq., well known to this Court, is the real City attorney, and that the attorneys representing the defendant in error in this cause are representing the personal interest created by sections 2 of the acts just cited. The contest, therefore, between the plaintiff in error and the defendant in error is not

a contest of one citizen with the City, but of one citizen with another citizen, and the moving force of this litigation is not the interest of the public, but the profit of private individuals.

The judgment here sought to be reversed has already borne fruit in a number of suits. Thirty-one suits similar to this case are now pending in the State Circuit Court, and others are pending in the United States Circuit Court, at Mobile.

See Brief of Defendant in Error, page 6.

This is the natural result of the decision of the Supreme Court of Alabama. The attorney for the defendant in error claims that the city is vested with the "absolute and unqualified" title to the "shore of the river and soil under it in front of Mobile", by virtue of said Act of January 31, 1867.

Mr. Smith's Brief, pages 35 and 36.

Consequently, such "unqualified" title, if it exists, has been vested by the City of Mobile, as a matter of course, in the lawyers conducting this litigation, as their fee, in accordance with the provisions of said section.

It has been said by this Court that "the power or the sovereign over the streets of a city is limited. He cannot alien them".

New Orleans v. United States, 10 Pet., 720.

If the sovereign cannot alien the highways on land, by the same rule he cannot alien the great water highways.

"Public rivers" are "highways".

Bullock v. Wilson, 2 Port. 436, 445.

Note to Dovaston v. Payne, 2 Smith's Lead. Cas. (9th. Am. Ed.), page 1392.

Counsel for the defendant in error, in his brief in support of his motion to dismiss or confirm the judgment of the Supreme Court of Alabama cites very largely from decisions of other states, to sustain his contention (See especially pp. 40 and 41).

Plaintiff in error has cited only Alabama cases to show the rule in that state prevailing until the judgment was rendered here complained of, and the few other authorities cited are to show that those rulings are in harmony with weightiest authorities, and that the judgment here complained of is a departure from a line of decisions which established property rights, assailed by the judgment complained of.

The decisions of other states should not be looked to overturn the established current of decisions in Alabama.

As was said by this Court in a late case :

" The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject ; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another."

Shively v. Bowlby, 152 U. S., p. 26.

Respectfully Submitted,

FREDERICK G. BROMBERG,

EUGENE H. LEWIS,

Of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 62.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
THE CITY OF MOBILE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Of Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

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Defendant in Error.

Petition for Rehearing of Plaintiff in Error.

TO THE HONORABLE MELVILLE FULLER, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiff in error respectfully applies for a rehearing in the above entitled cause, and for causes shows:

1.

That the Court in its opinion says, pages 8 and 9: "Had this patent been issued before the admission of Alabama into the Union, it would be difficult to see why it did not convey a perfect title."

It was decided by the Supreme Court of Alabama, in *Hallett vs. Hunt* (7 Ala., page 882), following this Court and noticing the different classes of claims enforced by the Act of March 3, 1819, that "a grant may be made by a law as well as by a patent pursuant to a law; and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*."

The exact language of the Court is as follows:

"The fourteenth section of the act of 1804, 'erecting Louisiana "into two territories, and providing for the temporary govern-

" ment thereof,' enacts, that all grants for lands with in the territories " ceded to the United States by the French Republic, by the Treaty " of Paris, in 1803, made after the Treaty of St. Ildefonso, shall " be deemed null, void and of no effect, from the beginning; except " in certain cases, &c. (1 Land Laws, 114, Ed. 1838.). Surely it " was competent for Congress to disregard this enactment, and " give to the Treaty a different exposition as to all grants which " were valid by the Spanish laws, or else exempt from its applica- " tion certain claims, by acknowledging that they are 'valid and " complete titles,' against the United States, or persons claiming " under them. This much the Act of 1819 has done *in totidem* " *verbis*, and its legitimate effect as it respects the grant to Forbes & " Co., is a declaration that the land conveyed by it, vested in the " grantees a title superior to any the United States had, or could " confer."

" It is further objected to the title of the plaintiff below, that it " will not sustain an action at law, because no patent was ob- " tained from the United States by the original grantees, or their " legal assignees, for the lands they claim. The recognition of its " validity by the Act of 1819, we have seen, was an admission that " it was complete in itself, and that the Federal Government had " no interest to convey. In *Strother v. Lucas* (12 Peters' Rep. 454), " it was held, that a grant may be made by law, as well as by a " patent pursuant to a law; and a confirmation by a law is as " fully, to all intents and purposes, a grant, as if it contained in " terms a grant *de novo*. And in *Grignon's Lessee v. Eckhart*, (2 " How. Rep. U. S. 344), it was decided, that an equitable became a " legal title, by its confirmation, by an Act of Congress, which " was equivalent to a patent. 'It was a higher evidence of title, as " it was the direct grant of the fee which had been in the United " States, by the Government itself, whereas the patent was only " the act of the ministerial officers.' See also, *United States v.* " *Arredondo*, and others (6 Peters' Rep. 723–4); Land Laws, (Part " II, Ed. 1838, Nos. 864, 1017)".

" It is not necessary to enable the assignees of Forbes & Co. to, " maintain an action, to show that the lands embraced by their " grant were actually located, and the limits defined by a surveyor " acting under the authority of the United States. The Act of 1819 " makes an unqualified acknowledgment of the validity and com- " pleteness of their title, without requiring any act to be done. The " eleventh section, which is the only one pertinent to the present

" point of inquiry, makes it the duty of the principal deputy sur-
" veyor for the lands south of the State of Tennessee, to survey, or
" cause to be surveyed, the lands, the claims to which are con-
" firmed, and that are directed to be granted as donations, where
" the same have not been already surveyed."

Pages 899 and 900,

2.

Petitioner further shows that the claim of Bernoudy is founded upon written evidence of title, the fact of such writing being established as a lost grant by oral evidence deemed sufficient by the Commissioner to whom Bernoudy's claim was presented. It comes under the provisions of section 2 of the Act of March 3, 1819; (3 Stat. at Large, page 528); and is confirmed in the same manner as if the title had been completed. The grant referred to in 7 Ala., above cited, is No. 21, July 8, 1802, of Commissioner Crawford's report, (3 State Papers, 398); the same report under which Munora claimed in right of Bernoudy.

3.

Petitioner further shows that Alabama did not adopt a State Constitution, or pass an ordinance accepting the proposition of Congress, made March 2, 1819, until August 2, 1819, four months after the confirmatory Act.

Code of Alabama of 1876, p. 68.

The State was not admitted into the Union until December 14, 1819.

3 Stat. at Large, page 608.

It is respectfully submitted that August 2, 1819, is the date from which the rights of the State vest, and not March 2, 1819.

The latter Act was entirely provisional. It vested no rights in the people of the territory of Alabama. The 9th section of the Act expressly provides that the constitution to be formed under the Act shall be transmitted to Congress for approbation. If the legal title to the soil under the navigable

waters of the territory of Alabama vested in the people of the territory of Alabama as an inchoate State, upon the adoption of the enabling act, then if Congress had not approved the Constitution so adopted by the people of the territory, we would have had the result that the legal title to the soil under the navigable waters of the United States vested in the people of a territory, and Congress divested of all control and regulation over it. That such would have been the consequence seems to the petitioner to clearly show that there could have been no vesting of the legal title on March 2, 1819, in the people of the territory of Alabama, or any estate suspending the rights of claimants under Spanish grants.

The rights of Bernoudy arose under acts which preceded by many years the Act of March 2, 1819, viz. the Act of April 25, 1812, (2 Stat. at Large, page 713).

This is shown by the field notes of the Bernoudy grant, shown on page 22 of the transcript of the record in this case, wherein it is recited as follows: "Pursuant to an order from the principal deputy "surveyor of the land district of the island of New Orleans, and "in conformity with certificate No____ from the commissioner ap- "pointed under the authority of the Act of Congress, *April 25*, "*1812*, and recognized by a subsequent Act approved March 3, "1819, I have surveyed a tract of land claimed by Regis Bernoudy, "on Mobile River, in the State of Alabama, etc."

These field notes and the report of the Commissioner, cited in the opinion of this Court, are proof of the cultivation and inhabitation by Bernoudy of this tract, and also that this tract was fully identified and its corners established and surveyed, which is only a *consequence* of identification, and not the cause of the identification. The *locus in quo* of "inhabitation and cultivation" must have been proved to the satisfaction of the Commissioner, and that the survey followed the proof is the presumption; otherwise, how could the Surveyor General have known how to establish the corners of the grant? Clearly, only from the evidence before the Commissioner, which established the fact, and the *locus in quo* as well as the inhabitation and cultivation.

It is well settled that papers referred to in patents and deeds become part thereof by reference, as much as if written into them, and the acts of 1812 and 1819 were referred to by the patent and field notes, part of the evidence offered by the petitioner in the court below.

4.

It is well settled by this Court that a grant of titles to lands once made by the legislature is irrevocable.

Tenet v. Taylor, (9 Cranch, 43, cited by STORY, J., in *Wilkinson v. Leland*, 2 Pet. 657).

It is there said by this Court: "A grant or a title to lands once "made by the legislature is irrevocable, and cannot be reassumed "by any subsequent legislative act; and that a different doctrine "is utterly inconsistent with the great and fundamental principle "of a republican government and with the right of the citizens to "the free enjoyment of their property lawfully acquired."

It is respectfully submitted that the rights of Munora under the Bernoudy grant commenced with the Act of April 25, 1812, under which he went before the Commissioner of the United States for the purpose or establishing his claim. It is also respectfully submitted that there is no passage in the Act of March 2, 1819, enabling Alabama to enter into the Union, which in any way suspended the rights under Spanish grants, which had been acquired under previous statutes of the United States, or nullified them.

It is further submitted that, if the doctrine of relation is to be applied in this case, the commencement of the title of Munora of the Bernoudy grant, under United States Statutes, relates back to April 25, 1812, more than seven years prior to the enabling act under which Alabama was finally admitted into the Union.

It is therefore respectfully submitted that the title of the petitioner is as perfect as if the patent had issued before the admission of Alabama into the Union.

Respectfully submitted,

FREDERICK G. BROMBERG,

EUGENE H. LEWIS,

Counsel for Petitioner.

We, the undersigned, members of the bar of this Honorable Court, certify that we have examined the foregoing petition and that, in our opinion, it is well founded and is not made for the purpose of delay.

Dated, January 20th, 1903.

FREDERICK G. BROMBERG,

EUGENE H. LEWIS,

Counsel for Petitioner.

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Clerk.

In Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,

DEFENDANT IN ERROR.

BRIEF OF HARRY T. SMITH UPON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE APPEAL UNDER RULE NUMBER SIX OF THE UNITED STATES' SUPREME COURT PRACTICE.

COMMERCIAL PTG. CO., MOBILE, ALA.

No.....

In Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,
PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,
DEFENDANT IN ERROR.

BRIEF OF HARRY T. SMITH UPON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE APPEAL UNDER RULE NUMBER SIX OF THE UNITED STATES' SUPREME COURT PRACTICE.

The action was ejectment by the defendant in error (plaintiff below) against the plaintiff in error (defendant below) to recover a portion of the shore and bed of the Mobile River between high-water mark and the channel line or point of practical navigability, situate in the city of Mobile, Alabama.

The defendant in error, who was the plaintiff in the trial court, and the appellee in the Supreme Court of Alabama, claimed, and the trial court and the Supreme Court of Alabama held, that the shore and bed of the Mobile River, which is a navigable stream in which the tide ebbs and flows, passed out of the United States Government and into the State of Alabama by virtue of the compact under which Alabama was admitted into the Union in 1819, and that this title passed from the State of Alabama to the City of Mobile by virtue of two acts of the legislature, which were in words and figures as follows:

"An Act Granting the City of Mobile the Riparian Rights in the River Front.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the shore and the soil under Mobile River, situated within the boundary lines of the City of Mobile, as defined and set forth in section two of 'An act to incorporate the City of Mobile,' approved February 2d, 1866 be and the same is hereby granted and delivered to the City of Mobile.

"Sec. 2. Be it further enacted, That the mayor, aldermen and common council of the City of Mobile be and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

"Approved, January 31, 1867."

"An Act to amend an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate.' Approved February 18th, 1895.

"Sec. 1. Be it enacted by the General Assembly of Alabama, That an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate,' approved February 18th, 1895, be, and the same is hereby amended so as to read as follows:

"Sec. 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining, or incidental, to any real estate, of any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the City of Mobile or in the Port of Mobile, or in the present City of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the City of Mobile, is hereby vested absolutely, and unconditionally in the City of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

"Sec. 2. Be it further enacted, That the said City of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part of the whole, of such property and the rights hereby vested in it and may if it thinks proper to do so, convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters.

"Approved, December 5th, 1896."

The plaintiff in error, who was the defendant below, asserted three propositions, each of which were denied by the Supreme Court of Alabama, and these, as we understand, constitute the only rulings which are here sought to be reviewed. They are as follows:

1. The plaintiff in error claimed to have acquired title to the land in question from the patentees of the United States Government under a patent issued in 1836; but the Supreme Court of Alabama held that the title of the United States Government having passed to the State of Alabama in 1819, the United States Government had no longer a title which it could convey to the grantors of the plaintiff in error.

2. The plaintiff in error claimed to have obtained the right of possession to the shore and the soil under the Mobile River to the point of actual navigability, by virtue of what it was pleased to call, its riparian rights as an abutting owner. But the Supreme Court of Alabama held, (1) that the plaintiff in error had no title to the adjoining land, and was not an abutting owner; (2) that a conveyance bounding the land by a tidal stream, conveys only to high-water mark, even when the grantor owns below.

It is, we think, true also, that the grant to the patentee in 1836, having been bounded by meets and bounds, and not by the river, would not have passed any riparian rights, even had the title thereto remained in the United States Government, but this point has not been passed upon by the Supreme Court of Alabama.

3. The plaintiff in error insists that the grant of the State of Alabama to the City of Mobile is violative of the constitution of the United States, upon the ground that it is an interference with the navigation, which, it is said, is per force an interference with interstate commerce. The Supreme Court of Alabama held, (1) that a conveyance by a trustee, even in violation of his trust, passes a legal title and will support an action of ejectment; (2) that the possession by the city to the line of

practical navagability, in trust for the public use (as the grant provided), would facilitate rather than hinder commerce; (3) that the constitution of the United States does not prevent the conveyance of the legal title from passing to any person or prevent the wharfing or proper use of any shore, and that the authority of the United States to interfere in this question arises only when there is an actual or threatened impediment to commerce.

There are other questions which are raised in this case but which bear no semblance, whatever, to federal questions and which it is therefore deemed unnecessary to discuss. For instance, it was asserted by the plaintiff in error and denied by the Supreme Court of Alabama, that the plaintiff in error was estopped in an action of ejectment by reason of having collected taxes upon the property sued for. Again it was insisted by the plaintiff in error and denied by the Supreme Court of Alabama that the grant from the state to the city was void because the act did not conform to the Constitution of the State, in that its title was not broad enough to cover all of the provisions of the act; and again it was contended by the plaintiff in error and denied by the Supreme Court of Alabama that the state statute of limitations were applicable to the case. These, however, being questions exclusively for the courts of the state, will not at this time be noticed further than to say that the ruling of the Supreme Court can be supported by an abundant citation of authority whenever the necessity arises.

The writer of this brief, regarding it as the duty of every counsel to be frank in the presentation of his cause, desires to say that the question as to whether the State of Alabama obtained a title to the shore and the soil under the Mobile River, by virtue of the compact under which Alabama became a part of the Union, oppears to him to be a federal question, but one which has been so frequently decided and as to which the law is so thoroughly established in this court, that it must now be classed as frivolous, unless it can be otherwise to per-

sist in requiring this court to reiterate doctrines which have already been established by a long and uniform line of its decisions, and that it appears to the writer, that to bring a case before this court only to have this doctrine reiterated, evidences a desire and purpose simply to obtain delay. (4) As to whether or not the question as to the effect of a patent from the United States Government in the year 1836, by which the government undertook to convey away lands to which it had no title, having already parted therewith in 1819, also presents a federal question, the writer entertains very serious doubts. This question, like that above mentioned, however, is one which has been so frequently considered by this court, always with the same conclusion, that it seems to us to be now properly classed amongst the frivolous, even if, indeed, the fact that it presents only the inquiry whether something can come out of nothing, would not have compelled this classification, had there been no decisions upon the subject.

We shall attempt, in a later portion of this brief, to justify these observations by the citation of authority upon each of these questions.

The third constitutional question attempted to be presented by the plaintiff in error, namely, that of interference with commerce, is, we think, in no manner involved in the case.

The defendant asserts and shall seek to establish the following propositions, almost any one of which should, we believe, suffice to dispose of the present writ of error:

First. That the title to the shore and bed of the Mobile River passed to the State of Alabama at the time that Alabama became a member of the Union, in 1819, and if so, the holding of the Supreme Court of Alabama that this title was passed from the State to the defendant in error, is conclusive of the case.

Second. That the patent issued by the United States in 1836 would, therefore, have been inoperative even had it de-

scribed the land in question, for the reason that the United States had no title to convey.

Third. That this patent did not describe the lands in question, because the grant was bounded, not by the river, but by meets and bounds.

Fourth. That even had the description bound the land by the river, the question as to whether this grant should be construed as extending to the low-water or to high-water mark is a question for the State, and not the federal courts.

Fifth. That the high-water mark has been universally held to be the boundary of the adjoining owner upon tidal streams and that there is no authority to the contrary, except where the question is governed by local statutes.

Sixth. That this is because the title, being in the state and not in the federal government, the adjoining owner takes, under such a patent, if anything, a mere revocable license, and this, not from the federal government, but from the state in which the title is vested, and it is, therefore, for the state alone to determine whether such a license is granted or not.

Seventh. That even in those states where such a license is granted by implication from the state, it is revocable at any time before it is executed.

Eighth. That in Alabama no such license is implied under our constitutional provision, and if it had been, would have been revoked by the grant of the title to the city in 1867.

Ninth. That upon all of these questions, except the first, the decision of the state court is final and not reversable, and that upon the question first named the law is settled beyond the bounds of controversy.

Tenth. That the federal control over interstate commerce is in no manner involved in this case.

Eleventh. That the other questions in this case cannot be considered by this court.

In discussing these questions, however, it is important to observe that the property sued for, is partly below, and partly

above, low-water mark, the former being the soil under the river between low-water mark and the channel of the river, as established by law, and the latter being the land between low-water mark and high-water mark, or what is known as the shore.

That the property sued for is thus divided into two portions, is of importance, because there are several decisions in Alabama which appear to hold that a grantee of the United States Government, of lands bounded by a navigable river not subject to the ebb and flow of the tide, conveys the title to *low-water mark*, but not beyond. We hope to be able to demonstrate, as the Supreme Court of Alabama has in this case considered, that these authorities have no application to lands where the tide ebbs and flows; nor to cases where the grant from the government is made subsequent to the admission of the state into the Union, nor where the state or its grantee is contesting this right. It is, nevertheless, of great importance to observe that whatever may be the law in regard this matter, according to the decisions upon which the appellant itself relies for the establishment of the rule which it asserts, its title would be expressly limited to low-water mark, and would not extend to that portion of the property sued for, which lies between low-water mark and the channel of the river, and there being a portion of the land sued for below low-water mark, which the appellee was entitled to recover even under the appellant's own contention, there could be no error in the charge directing the jury to find for the plaintiff.

It is also important in entering upon an examination of this question, to observe that no question arises in this case as to accretions, or alluvia, since the property sued for lies between the present high-water mark and the channel of the river, and does not include any portion of the property back of that which may formerly have been covered by water, but which, by gradual accretions, has now become dry land. We do not discuss the question as to accretions, or as to the title

to the land which lies above the present high-water mark, but which was covered by water at the time of the admission of this State into the Union and at the time of the conveyance by the state to the city, because this question is in no wise presented by this record, and we respectfully suggest that any expressions upon this subject would be a dictum, given without a proper opportunity for argument, or occasion for investigation, and which might embarass a proper decision of this question when it arises, as it will do hereafter, in other litigations which are now pending and in which these accretions are involved.

First, second, fourth, fifth, sixth, seventh and ninth.

The propositions which we have announced under subdivisions first, second, fourth, fifth, sixth, seventh and ninth have been so frequently treated together in the dicisions, that we shall not now undertake to separate them, although they seem to us to be entirely distinct. Did, therefore, the title to the bed and shore of the Mobile river, which is in fact navigable, and in which the tide ebbs and flows, pass to the State of Alabama by virtue of the compact under which the State became a member of the union? If so, could the United States Government thereafter convey the same to a third person? If the patentee of the United States in a patent issued after the land had passed to the State, took anything, was it a title or a license? If a license, was it revocable? And upon this question can the court review, or is it bound by the decisions of the State courts?

That the shores and beds of all navigable streams within the limits of the State, became the property of the State by virtue of the act of its admission into the union, ought no longer to be questioned.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.
Shively vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs., 168 U. S. 357.

Indeed it is both interesting and important, if not entirely conclusive of this case, to note that prior to the issuance of the patent upon which the appellant relies, the Congress of the United States undertook by the act of May 26th, 1824, to convey these lands directly to the City of Mobile and that the City of Mobile brought suit for the recovery thereof against those who were then in possession, and that the city was defeated in these suits upon the simple ground that the United States Government had parted with the title to these lands in the year 1819, by virtue of the compact under which the State of Alabama was admitted into the union, and that the title was therefore in the State and could not then be conveyed by the United States Government. The validity of the act of Congress in other respects was in no manner questioned; the power of the government to convey such lands when it possessed the title thereto was not doubted; but both the Supreme Court of Alabama and the Supreme Court of the United States explicitly decided that the city could not obtain a title from the United States Government in 1824 to land which the government had conveyed to the State in 1819, and yet it is contended that the United States Government could and did convey the title to these lands to those under whom the appellant claims, *in the year 1846*. It was because the United States Government had undertaken to convey these lands to the City of Mobile, and because it had been held by the Supreme Court of Alabama in the City of Mobile against Eslava, 9th Porter, 578, and by the Supreme Court of the United States in Pollard vs. Hagan, 3rd Howard, 212; in the City of Mobile vs. Eslava, 16th Peters, 240, and in Goodtitle against Kibbe, 9th Howard, 471, that the title to these lands was vested in the State of Alabama, and in order to carry out the purpose of the act of Congress of May 26th, 1824, that the Legislature of the State of Alabama passed the act of January 31st, 1867, Acts of Alabama 1866-7, p. 307.

It would certainly now be a most curious result should the City of Mobile be held not to be entitled to these lands by

reason of the denial of the very fact the existence of which was, in these cases held to defeat the grant from the United States Government to the City of Mobile.

The decision which is now sought to be reviewed, adhering to the established doctrine in Alabama, as indeed of all the courts where the question has been considered unaffected by a statute, has held that the patent of the United States describing the grant as bounded by a tidal stream, would pass title only to the high-water mark, both because such would be the proper construction of the grant, and because the Federal Government owned no title beyond this point, to convey. Before examining into the decisions on this point, however, we beg to cite the following cases as establishing the proposition that the State decisions upon this point are conclusive upon this court.

Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Rutz, 138 U. S., 250.
Water Power Co., vs. Water Comrs., 168 U. S., 357.
Shively vs. Bowlby, 152 U. S., 1.
I. C. R. R. vs. Illinios, 146 N. S., 517.

We have made our investigation exhaustive, and state at the beginning of this argument, that although the questions about to be presented have been repeatedly considered both in England and in almost every State in this union, we have found no case where a grant by the government to an individual, of lands bounded by a *navigable stream where the tide ebbs and flows*, has ever been held to carry the shore below the high-water mark; nor does there exist (we believe) a case where the space between high and low-water mark even upon a navigable stream *above* the ebb and flow of the tide, was ever held to pass to a patentee of the United States Government under a patent issued subsequent to the admission of the State in which the lands were situate, while as in the case at bar, the State or its assignees was asserting title thereto.

The question first came before the Supreme Court of Ala-

bama, in the case of Mobile vs. Eslava, 9 Porter, 577, where it was held that the title to this land passed from the United States to the State of Alabama in 1819, by virtue of the compact under which Alabama became a member of the Union, and that a subsequent patent from the United States passed no title whatever. This case was cited with approval, and affirmed in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and the doctrine there asserted was reaffirmed by our Supreme Court in the later case of Kennedy vs. Bebee, 8 Ala., 909, and in Pollard vs Greit, 8 Ala., 941.

The case of Mobile vs. Eslava, was appealed to the Supreme Court of the United States, and was by that court affirmed.

This Alabama doctrine has also been thoroughly established by the Supreme Court of the United States.

Pollard vs. Hagan 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 471.
Hoboken vs. Pa. R. R, Co., 124 U. S., 656.
Shiveley vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs., 168 U. S., 357.
Hallett & Walker vs. Bebbe, 13 How., 25.
And other authorities that will be mentioned hereafter.

In Weber vs. Harbor Comrs., 18 Wal., 64, it seems that one who obtained title from the Government which itself had parted with title to shore, did not become entitled to any riparian rights whatever.

In each of these cases, constituting four distinct decisions of the Supreme Court of Alabama, as well as several decisions of the Supreme Court of the United States, the question as to the title of the patentee of the United States government under the patent issued subsequent to the admission of the State into the Union, for the lands between high water mark and low water mark, was distinctly presented. It was the only question in the cases. It was elaborately considered, and unquestionably decided, that neither the United States government, nor a private individual, can grant a title, which it does not possess.

Not only is this court bound by the decision of the Supreme Court of Alabama, and not only has the Supreme Court of Alabama frequently decided these questions, but those decisions were right, as we shall attempt to demonstrate. It is said that this doctrine, so firmly settled upon the early judicial history of our State, and which has been again reiterated in the decision of the case at bar, is opposed to the case of Webb vs. Demopolis, 95 Ala., 116.

An examination of the cases will show that from the beginning of our government, it has been the universally settled doctrine of the State of Alabama, and of the Supreme Court of the United States, that the title to the land lying *below high water mark, upon navigable streams, where tide ebbs and flows,* is vested in the State of Alabama, and that the patent of the United States government, issued *subsequent to the admission of the State into the Union*, conveys no title, whatever, to these lands, and if they correctly expound the law, they leave us only to inquire as to whether the State could and did convey these lands to the city of Mobile. Both of these questions have been decided by the Supreme court of Alabama with affirmation and upon these questions the decision of that court is final unless it results in an interference with interstate commerce which it is not possible to conjecture.

It would do but little credit to the eminent jurists, who concurred in this opinion, to suppose that it was their intention to overrule several former decisions of their own bench, which had been cited with approval not only by the Supreme Court of Alabama, but repeatedly by the Supreme Court of the United States, and which reasserted the same doctrine at intervals of ten years apart, and this, without even a citation or mention of these cases, or the slightest consideration of the doctrine therein established or the citation of a single case which conflicted with them; it would be indeed unfortunate for the inhabitants of the state of Alabama, if the rules of property which had stood unquestioned for several generations

were to be changed without a discussion, or a mention of the former decisions of the Supreme Court of Alabama by which they had been so repeatedly asserted. These considerations assure us of the conclusions which we have reached, to the effect that these cases do not in the slightest conflict.

It is decided in the case of Webb vs. Demopolis, 95 Ala., 129, that "whether the grant made by the United States to George S. Gains for the Demopolis Town Company, and which enured to its benefit, of the land upon which the city of Demopolis now stands extended to ordinary high water mark, or to the line of the low water, or to the middle thread of the Tombigbee River, depends therefore upon the rule of property in this respect which Alabama has adopted. *The rule which this state has adopted* and declared through this court is, that a grant by the United States to land bordering *on a navigable river* includes the shore or bank of SUCH RIVER, and extends to water line thereof at low water." (The emphasizing by capitals and italics in this and the following quotations are our own.)

How then are we to reconcile this language with the cases already cited where it was repeatedly asserted "that a grant by the United States to lands bordering on a navigable *stream where the tide ebbs and flows extends only to high-water mark?*"

The cases are plainly distinguishable upon other grounds to be mentioned hereafter, but the distinction which is made most prominent by the universality of its adoption and that drawn by the cases themselves, is to be found in the fact that in Webb vs. Demopolis the court was considering the rights of a riparian owner upon a *navigable river where the tide does not ebb and flow*, while in the cases cited by the appellant and in the case at bar, the lands in question constitutes the shore and the bed of the *tide waters* of the state.

To him who is just beginning the consideration of this subject, it may appear at a glance that there is no good reason for such a distinction, but it is not so.

The common law of England, so far as it is applicable to

our institutions and remains unchanged by our statutes. is the law of Alabama, and from the policy of this law no state in the union has, in this matter, ever departed so as to extend the rights of a riparian owner. Owing to the fact that in England the rivers above the ebb and flow of the tide are, as a rule, small and unimportant, the title of the riparian owners thereon, was extended to the middle of the stream, while the right of the riparian owner, upon waters where the tide ebbs and flows, was restricted to the high water mark. The rule has never been otherwise in England, and no court either in England or in America has ever extended the common law right of a riparian owner. Some of the states, Alabama amongst them (see Webb vs. Demopolis and cases these cited), have *restricted* the right of a riparian owner upon streams which were in fact *navigable, although above the ebb and flow of the tide.* Some of these states have restricted them to the low water mark; others to the high water mark, while others adhere to the old common law distinction and permit them to hold to the middle of the stream. The difference in the rule which prevails in the several states in this particular, rests entirely upon the difference between them as to what shall constitute the test of navigability. The test most consonant with good sense is that, of course, which has been adopted in Alabama, where it is a question, a fact to be determined by the practicable test of whether the stream is actually navigable; many of the states hold to the distinction of the common law. Those states that adopt the Alabama rule hold that the same reason which restricts the riparian owner to high water mark where the tide ebbs and flows, alike operates where the stream is actually navigable, though above the influence of the tide, and therefore restrict him, in some states, to high water mark and in other states to low water mark. The modification of the common law, however, in every case has been a restriction and not an extension of the riparian ownership. Where the common law has not been strictly adhered to it has been—in every case—because the reason

which restricted him in England where the tide ebbed and flowed, alike restricted him in America where the *river* was actually navigable.

This, an investigation of the cases will demonstrate, is the rationale of the rule and this is the distinction which existed between the case of the city of Mobile vs. Eslava, and that of Webb vs. Demopolis. In other words the latter case only decides, that in Alabama, the Demopolis Co. was *restricted* to low water mark although at common law its title would have extended to the centre of the stream; and this because the reason of the rule which restricted the riparian owner where the tide ebbed and flowed also in a degree at least, restricted him when the river was in fact navigable, though the tide did not ebb and flow. While in Mobile vs. Eslava the riparian owner, being upon a stream where the tide ebbs and flows, owned at common law only to high water mark and was therefore confined to that limit.

Owing to the importance of the cause, we shall ask the court to follow us through a somewhat extended inspection of the cases, as bearing upon the contention just stated.

The Federal Court will not construe a grant bounded by a navigable stream as conferring any title below the high water mark, although the state may allow riparian rights below this.

Packer vs. Bird, 137 U. S., 669.

In Shively vs. Bowlby, 152 U. S., 43, it is said:

"By the common law as before remarked, such additions to the land on navigable waters belong to the Crown, but, as *the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide;* that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tidé waters, found in the monuments of common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography, of the British island and that of the American continent. It

had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines, with regard to the ownership of the spill in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as above remarked, is for the several states themselves to determine."

That the modification of the common law has been a *restriction and not an extension* of the right of the riparian owner is clearly stated in

Packer vs. Bird, 137 U. S., 666,

where it is said,

"The question presented is, whether the patent of the United States describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

"It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high water mark. The title to land below that mark in such cases is vested in England in the Crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of considerable extent, are navigable in fact, which are not

subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and by vessels larger than any which sailed on the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of The Daniel Ball, 10 Wall., 557, 563: 'They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'

"The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common law doctrine on this subject, prevailing in England, is held in some of the states, but in a large number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time, has given way, or been greatly modified, under the different conditions there."

Again in 137 U. S., p. 669, it is said:

"As an incident of such ownership the right of the riparian owner, *where the waters are above the influence of the tide*, will be limited according to the law of the state either to low or high water mark or will extend to the middle of the stream."

In Bullock vs. Wilson, 2 Port., 445, the court said:

"There has been much litigation whether the right extends to the high, or low, or the ordinary water mark, or to the centre (often called the thread) of the river. Our chief concern at present, is with a navigable river, *where the tide does not ebb and flow*."

To the case of Jennings, ex parte, (6 Cowen, p. 544) the reporter has appended a note, in which are collated most of the

authorities on this subject. A brief notice of this, instead of the original cases, will suffice on the present occasion. It is there said to be settled by the Common Law, "that where a man's land *abuts* upon or *adjoins* to any river above tide water, he owns the river to the centre of the stream."

In Wright vs. Seymour, 69 Cal., 126-7, (10, Pac. 323) after asserting the proposition that at common law all streams wherein there was no flow and reflow of the tide were in navigable streams, and that the riparian owners owned to the thread thereof and the difference in circumstances between England, where that rule originated, and this country, the Supreme Court of California said:

"The doctrine of the common law in reference to the rights of riparian proprietors upon streams which are navigable in fact, though not subject to the flow and reflow of the tide, has been modified in some respects in many states of the Union. In Pennsylvania, Alabama, Tennessee, and some other states the doctrine is held that in all streams navigable in fact, the riparian proprietor only takes to low water mark, the soli and water formed between the lines that described low water mark being retained as eminent domain for the use of all citizens and that the right of navigation in all such navigable waters is the paramount public right of every citizen. (Flanigan vs. Philadelphia, 42 Pa. St., 219; M. B. Co. vs. Kirk, 46 Pa. St., 112; Bullock vs. Wilson, 2 Port. Ala., 436, Elder vs. Burrus, 6 Hump., 356-358.)

"We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a *tidal stream*, in the absence of an express intention so to do, has been construed to pass title to any land *below high-water mark;* and the doctrine of sections 830 and 670 of our Civil Code is believed to be but a declaration of the law on this subject, as it has existed since the formation of our state government."

Section 830 is in the following language:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream at

low water mark; when it borders upon any other water the owner takes to the middle of the lake or stream."

Section 670, *supra*, is as follows:

"The state is the owner of all land below tide water, and below ordinary high water mark, bordering upon tide water within the state, of all land below the water of a navigable lake or stream, etc."

Wright vs. Seymour, 69 Cal., 126-7.

The above shows the policy of the law to restrict and not to enlarge the riparian ownership at the expense of the state.

It is not, therefore, surprising to find that in Webb vs. Demopolis and in every other case in Alabama where it has ever been held that the riparian owner took below high water mark, the land in question was situate far above the influence of the tide, and was upon a stream of such a nature that at common law the riparian owner took to the middle of the stream, and that his common law right was by the decision restricted and not extended.

Following the common law all of the authorities, except in states controlled by statutes, agree that the riparian ownership on *tide* waters extends only to high water mark.

Alabama—Mobile vs. Eslava, 9 Port., 577.
" Goodtitle vs. Kibbe, 1 Ala., 403.
" Kennedy vs. Beebe, 8 Ala., 914.
" Pollard vs. Greet, 8 Ala., 941.
" Mobile vs. Mobile Trans. Co., M.S.

(California)—People vs. Morrill, 26 Cal., 357.
" More vs. Massini, 37 Cal., 432.
" Wright vs. Seymour, 69 Cal., 122. (10 Pac., 323).
" Long Beach Land & Water Co. vs. Richardson, 70 Cal., 209. (11 Pac., 695).
" Kimball vs. McPherson, 46 Cal., 108.

(Connecticut)—East Haven vs. Hemingway, 7 Conn., 202.
" Simons vs. Freach, 25 Conn., 352.
" Middletown vs. Sage, 8 Conn., 221, 228.
" Chapman vs. Kimball, 9 Conn., 40-1.
" State vs. Sargent, 45 Conn., 373.

(Florida)—Sullivan vs. Moreno, 19 Fla., 219.
" Rivas vs. Solary, 18 Fla., 126.

(Maryland)—Day vs. Day, 22 Md., 537.
" Garritee vs. M. & C. C. of Balto., 53 Md., 432.
(Mississippi)—Martin vs. O'Brien, 34 Miss., 22.
(New Jersey)—Gough vs. Bell, 1 Zab., 157.
" Bell vs. Gough, 3 Zab., 624.
" State vs. Jersey City, 1 Dutch, 525.
" Stevens vs. P. & N. R. R. Co., 5 Vroom, 532.
(New York)—Wheeler vs. Spinola, 54 N. Y., 385.
" Trustees vs. Kirk, 68 N. Y., 460.
" Gould vs. H. R. R. Co., 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 523.
" Roberts vs. Baumgarten, 110 N. Y., 380. (18 N. E., 96)
(Oregon)—Bowlby vs. Shively, 22 Oregon, 410. (30 Pac., 154).
" Parker vs. Taylor, 7 Oregon, 445.
(Rhode Island)—Bailey vs. Burges, 11 R. I., 331.
" Aborn vs. Smith, 12 R. I., 373.
" Brown vs. Goddard, 13 R. I., 76.
(Texas)—Mayor of Galveston vs. Menard, 23 Tex., 349.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, id., 531. (27 Pac., 550).
" Morse vs. O'Connell, 7 Wash., 117. (34 Pac., 426).
" Allen vs. Forrest, 8 Wash. & 702. (36 Pac., 971).

There is a dictum to the contrary, in the case of Peck vs. Lockwood, 5 Day, 22 (Conn.), but that was subsequently repudiated in the case of Chapman vs. Kimball, 9 Conn., 40.

The cases in Maine, Massachusetts and New Hampshire are not exceptions to the rule, since the colonial ordinance of 1641, which was in effect a statute, expressly extended the right of riparian proprietor in the soil from high to low water mark.

(Maine)—Parker vs. Cutler Milldam Co., 20 Me., 357.
" Babson vs. Tainter, 10 Atlantic Rep., 63.
(Massachusetts)—Mayhew vs. Norton, 17 Pick., 359.
" Green vs. Chelsea, 24 Pick., 77.
" Salstonstall vs. Proprietors, 7 Cushing, 195.
" Boston vs. Richardson, 105 Mass., 354.

(New Hampshire)—Clements vs. Burns, 43 N. H., 609, 621.
" Nudd vs. Hobbs, 17 N. H., 524.

We can say with the Supreme Court of California:

"We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a tidal stream, in the absence of an expressed intention so to do, has been construed to pass title to any land below high-water mark."

Wright vs. Seymour, 69 Cal., 126 7. (10 Pac., 323.)

The writer of this brief is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to furnish no test whatever. Far from complaining that our court has abandoned the test in part, I am quite sure that the logical solution of the question is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows.

McManus vs. Carmichael, 3 Iowa, 1.
People vs. Canal Co., 33 N. Y., 466-7.

The abandonment of an erroneous rule—one founded upon the topography of England and utterly inapplicable to America—should be entire and not partial.

To restrict the owner to high-water mark wherever the

river is actually navigable is the logical rule and that which is approved by the Supreme Court of the United States.

Barney vs. Keokuk, 94 U. S., 324.
Packer vs. Bird, 137 U. S., 671.

And by nearly all of the states which have departed at all from the old common law rule.

It may be, however, that in Alabama the wholesome and much neglected rule of *stare decisis* forbids the overruling of Webb vs. Demopolis and the cases therein cited. Nothing, however, could justify the extension of the low-water mark rule to tidal waters. Such an extension would be without authority; in the teeth of an overwhelming and universal line of decisions both in England and in America.

But there are other grounds upon which we may reconcile Mobile vs. Eslava, 9 Port., 603.

Goodtitle vs. Kibbe, 1 Ala., 403.
Pollard vs. Greit, 8 Ala., 940.
Kenedy vs. Bebee, 8 Ala., 914.

and the many cases in the Supreme Court of the United States with the cases of Webb vs. Demopolis and those upon which it rests, and upon which we may justly claim that these later decisions do not affect the case at bar.

We shall undertake to show that neither in Webb vs. Demopolis, nor any other case, has the Supreme Court of Alabama ever questioned the doctrine of the City of Mobile vs. Eslava, and the other cases supra, but that this doctrine stands to-day as the unquestioned law of this state. This we shall do by referring to each of the cases in this state, leading up to the case of Webb vs. Demopolis, none of which has the slightest application to the case in hand.

It is decided in the case of Webb vs. Demopolis, in the 95th Alabama, page 129, in which, however, the land was above the ebb and flow of the tide, and which cannot therefore affect the question whereas in the case at bar the land is below tide waters, that "whether the grant made by the United States to George S. Gaines for the Demopolis Town Company, and

which enured to its benefit, of the land upon which the city of Demopolis now stands, extended to ordinary high-water mark, or to the line of the low-water, or to the middle thread of the Tombigbee River, depends, therefore upon the rule of property in this respect, which Alabama has adopted. The rule which this state has adopted and declared through this court is, that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low-water."

Had the grant by the United States government to George Gaines been issued prior to the admission of the State of Alabama into the Union, this case would assert that some title passed *from the State to the grantee of the United States Government*, and not from the United States Government to its grantee. A title, like any other thing, or right, can, of course, pass only from the place from which it then is. The title was in the state, and if it passed to any other person, it had, of course to pass from the state, and from no other source. Had the grant in this case, therefore, been made subsequent to the admission of Alabama into the Union, and were the lands in question within the influence of the tide waters, it would be necessary for us to go further, and inquire how that title passed from the state into the grantee of the government, and what was the nature of the title which did pass; whether a title or an easement, whether revocable or irrevocable, and whether the circumstances of the present case are such as to have carried this title from the state; also as to when this title is supposed to have passed, and whether, at this time, it was in the state, or in some other person; and if in some other person, then whether or not the same circumstances which operated to divest the state of its title, would operate to divest the grantees of the state of their title.

It seems to us, however, to be clear, that since the grant which was construed in the case of Webb vs. Demopolis, was a grant by the United States government before the admission

of the state into the Union, this case has no application whatever. There the title to the land in question had never been conveyed to the state. The question therefore as to how far the title extended was only a question of construction, or of intent. The grantor in the instrument to be construed in those cases, held at the time of the grant, the title to the land not only down to the high water mark, but also to low water mark. The question in the present case is a question of the power of the United States government to grant what it did not possess. The question in the case of Webb vs. Demopolis, and in all other cases where the grant was made at the time that the government making the grant, owned the land down to low water mark, and beyond, was a simple question as to the construction of the grant, or, in other words, as to the intention of the grantor in describing the lands. The rule, therefore, laid down in Webb vs. Demopolis, was only a question as to the intention of the United States Government, or the construction of its patent. The question as to the effect of the grant by the United States Government, conceded to describe the lands as far as the low water mark, but made at a time when the government possessed no title below high water mark, was not presented in the case of Webb vs. Demopolis, and ought not to have been, and was not decided in that case. On the contrary, in the case of the City of Mobile vs. Eslava, 9 Porter, 603, and in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and in the case of Pollard vs. Greit, 8 Ala., 940, and in the case of Kennedy vs. Bebee, 8 Ala., 914, and in the several decisions of the Supreme Court of the United States, the question was, as it is here, not as to what land was described in the patent, but as to what effect was to be given to a patent issued by the United States Government to land which it had already conveyed to the State of Alabama, and to which it therefore possessed no title. In all of these decisions it was expressly decided, that where the United States Government had parted with its title to the land to the State of Alabama, by admission

of the State into the Union, as it did with all shores of navigable streams, not already disposed of, a subsequent patent by the United States Government was wholly void, and passed no title, that is to say, it neither passed the title from the United States Government nor operated to pass the title out of the State, and in each of these cases it was distinctly held that the patentee of the United States Government could not maintain ejectment for the possession of the property.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.

What we have said seems to us to demonstrate that the case of Webb vs. Demopolis, 95 Ala., 126-7, is in nowise in conflict with the doctrine formerly established in this State in Mobile vs. Eslava, 9 Port, 577.

The only cases cited by Webb vs. Demopolis, in the 95th Alabama, were those of

Williams vs. Glover, 66 Ala., 189.
City of Demopolis vs. Webb, 87 Ala., 670.
Doe vs. James, 11 Ala., 63.

None of these cases cite any Alabama cases, with the exception of the case of

Howard vs. Ingersoll, 17 Ala., 790.
Bullock vs. Wilson, 2 Porter, 436.
Mayor of Mobile vs. Eslava, 9 Porter, 577.

Demopolis vs. Webb, 87 Ala., 670, is the same case as Webb vs. Demopolis in the 95th Ala., and this case, therefore, needs no further discussion.

In the case of Williams vs. Glover, it is tersely said "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks." This again was a case where the land in question was upon a navigable river, but above the ebb and flow of the tide. That this authority did not intend to overrule the case of Mobile vs. Eslava in the 9th Porter, is evidenced by the fact that it cites that very case as the authority for the assertion just made. Williams vs. Glover was an action

by a landlord against a tenant for rent. The tenant could not, of course, dispute the title of his landlord to the land described in the lease. He had the right, and the simple right, to raise the question as to the proper construction of the terms of the lease, and whatever the lease described, the landlord was supposed to own, provided, of course, it was susceptible of private ownership. The report does not show upon what title the landlord relied. This title may have been derived from the State, and not from the United States Government at all, or it may have been derived from the United States before the admission of the State into the Union. The question which is now before the court was not in the slightest involved in the case of Williams vs. Glover, and it was not discussed or considered. It is, at most, a dictum that a grant made by the government which owns the land and which bounds the grant by the river, above tide waters, would be construed to intend to convey to the low water mark.

The case of Howard vs. Ingersoll, in 17 Ala, 790, is a case where the construction of a grant to an individual was under consideration. That case involved simply the construction of a treaty, and it was there held that where the dividing line between two states was established as the river line on one side, the line referred to must be supposed to be low water mark. But the ground of this decision is simply a question of convenience in political divisions of government, it being apparent that it would be dangerous, as well as inconvenient, if the jurisdiction of one state should extend across the river up to the high water mark on the other side, while the jurisdiction of the other state extended only as far as high water mark on its own side of the river. If such a construction were given to the treaty, it would of course, create the ownership in one state of a narrow strip of land lying across the river from any other portion of its territory, which would be of such a character that it could not be inhabited, and therefore impossible to police, a result which would, of course, be ruinous. The ques-

tion as to the effect of the grant by the United States Government of land bounded by a river, or other navigable stream, subsequent to the time when the United States Government had ceased to have any title to the land below high water mark, was not, to any degree, involved in that case, and indeed, it was not even material in that case as to what would have been the proper rule of construction of the individual grant bounded by a river, made by a government while owning the land to the centre of the river. Indeed, in that very case, Chief Justice Dargan said that he did not think it necessary to examine the numerous decisions with which our books abound, and to many of which they had been referred, for the reason that they had reference to the rights of individual owners. *But, however this may be, the river which was in question in Howard vs. Ingersoll, 17 Ala., 790, was not a navigable stream, and on pages 791 and 792, the chief justice expressly distinguished between the cases which he was considering, and the cases where the land was bounded by navigable water where the tide ebbs and flows.*

The case of Kennedy vs. Jones, in 11 Ala., 63, does however, relate to a part of the water front in the city of Mobile, but does not in any manner affect the question under discussion. This decision was rendered by Chief Justice Collier, the same judge who rendered the dscision in Eslava vs. City of Mobile, and the subsequent case of Pollard vs. Greit, in 8 Ala., and it would have been queer had he intended to assert anything in conflict with these cases after they had been approved by the Supreme Court of the United States, and without in any manner referring to them, and it is not surprising, therefore, to find that there is nothing whatever in the case of Kennedy vs. Jones, intimating in the slightest degree that the grantee of the United States Government under a patent issued subsequent to the admission of the State into the Union, took anything below high-water mark. In this case of Kennedy vs. Jones, on the contrary, see pages 84, 85 and 86, it was held

that the grant to the soil below high-water mark, had been made by the Spanish Government long before the admission treaty under which the United States Government obtained title to the property in question, and that transfer of the possession of Mobile and the adjacent country from Spain to the United States in 1813, did not interfere with the title below high-water mark, *which had been already expressly granted to the City of Mobile by the Spanish Government.*

The only other case cited, is the case of Bullock vs. Wilson, 2 Porter, 445. In this case, it was distinctly held that the grantee of the United States Government did not take beyond low-water mark but whether he took between high-water mark and low-water mark was not presented by the facts in the case. The holding in that case was simply to the effect that the riparian owner could not claim below low-water mark, and the court does not discuss the question as to whether he could go to that extent, or not, that being entirely irrelevant to the case. *In addition to this, this case was not a case of tide water, but the property in question was bounded by the Coosa river.*

These are the only cases decided by the Supreme Court of Alabama, which are relevant to the question in hand, so far as we have been able to discover. A careful reading of these cases will demonstrate that every time that the question now urged upon the court, that is to say, the question as to the effect of the grant by the United States upon land *bounded by tide water,* made by the United States Government, subsequent to the admission of the State of Alabama into the union (including several distinct submissions), the Supreme Court has emphatically declared that the title of the patentee of the United States Government extended only to high-water mark.

There is, thefore, no conflict whatever in the decisions of the Supreme Court of Alabama.

In challenging the production of a case where it had ever been held that the shore of tide waters passed by a patent from the United States Government, issued subsequent to the ad-

mission of the State, we were aware that in several States the riparian owner, even upon tide waters, has been permitted by statute and even by acquiescence, to wharf out to navigable water. This privilege, wherever recognized, however, has been obtained directly from the State, it is not a title, but a license: it is not a right against the State or its assignee, but merely a privilege, supposed to be indulged by the State in the absence of an expression of a contrary intent.

This doctrine of an implied license to wharf cannot, we think, have any application in Alabama, where it is provided by section 25 of the Declaration of Rights, that "No tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same is *expressly* authorized by law."

The doctrine where it prevails, however, is to the effect that in the absence of the expression of the contrary intention on the part of the State, acting through those who are authorized to act in this matter, it will be assumed by the court that the State intends to permit the owner of the adjoining land to use the land between low-water and high-water mark, which is adjacent to its other property. The Supreme Court of Alabama, of course, has no power to create any license, but this license must come from the State, and not from the court. The cases of Stephens vs. P. & N. R. R. Co., 34 N. J., L 546, and of Pa. R. R. Co. vs. N. Y. & L. B. R. R. Co. 23 N. J., E. 159, are directly in point, and it was there held, after an exhaustive argument of the matter, that the court will presume an intention on the part of the State to grant a license to the owner of adjoining lands, to use the shore, *though this license is, at all times, revocable before the acceptance thereof.* The same idea seems to be suggested in the language already quoted from Webb vs. Demopolis where it is said, "this doctrine proceeds on the theory that inasmuch as the State owns in its sovereign ca-

pacity the soil under the waters of navigable streams, it is within the State's competency to determine to what extent its prerogatives to lands so submerged shall be exercised, and to what extent such prerogative shall be abated, or not asserted and exercised, in the sense of admitting individual proprietorship in such lands."

In the case at bar, there was no acceptance of the license in question, prior to the act of 1867, by which this license was expressly withdrawn, or, rather, the proprietorship of the State was expressly asserted and exercised by a State "in a sense admitting individual proprietorship in the city of Mobile.' The most extreme construction which could be placed upon the language of Webb vs. Demopolis, will not authorize the supposition that the State could not by statute, before the exercise of any right over these lands, assert and exercise its prerogative by admitting individual proprietorship and conveying the land, to a distinct individual, and thereby cutting off the supposed license. If it be suggested that the grant by the United States was made in 1836, while the grant by the State of Alabama to the city of Mobile, was made in 1866, and that, therefore, about thirty years had elapsed during which the license was in force, it is sufficient to say that while it may have been true that during that time the patentee did have power to avail himself of this license, he did not do so, and that it was revocable until it was exercised, or, rather, that there is nothing from which to imply the license until it is exercised.

My theory in regard to the nature of the right which the grantee of the government obtains to the lands below high water mark in those states where this rule prevails, is supported by the case of Shively vs. Bowlby, 152 U. S., 55, where it is said, "Upon a review of its prior decisions, the court was of opinion that by the law of Oregon, in accordance with the law as formerly held in New York in Gould vs. Hudson River Railroad, 6 N. Y., 522; with the law of New Jersey, as declared

in Stevens vs. Paterson & Newark Railroad 5 Vroom (34 N. J. Law) 532, and recognized in Hoboken vs. Pennsylvania Railroad, 124 U. S., 656; and with the law of the state of Washington, on the other side of the Columbia River, as declared in Eisenback vs. Hatfield, 2 Wash. St., 236; and upon the principles affirmed in decisions of this court, above cited, and especially in Hardin vs. Jordan, 140 U. S., 371-382; the authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, *but was a mere license revocable at the pleasure of the legislature until acted upon: and that the State had the right to dispose of its tide lands free from any easement of the upland owner.*" See 22 Oregon, 420.

Speaking of this matter on page 51, Shively vs. Bowlby, Supra, the court said:

"It is evident, therefore, that a donation claim under this act, bounded by the Colombia River, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high water mark. Nor is any such effect attributed to it by the law of the State of Oregon." On page 58 it is said:

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

In the case of Barney vs. Keokuk, 94 U. S., 324-338, which was quoted with approval in Shively vs. Bowlby, 152 U. S., 44, and also by our Supreme Court in the case of Webb vs. Demopolis, it was said: "Whether, as rules of property, it would now be safe to change these doctrines where they have been applied as before remarked, is for the several states

themselves to determine. If they choose to resign to the riparian proprietor rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections." From these quotations, as well as from the admitted fact that the title was in the state, and not in the United States, to the lands beneath low water mark, after the admission of the state into the Union, it must necessarily follow that whatever title to these lands was obtained subsequent to the admission of the state into the Union, was obtained from the state and not from the United States. It is quite clear that the title could not possibly have come from the state without either an act of legislature, or a deed, or a patent. The Supreme Court could, of course, decide what the state had granted, but it could not, itself, make a grant. All that the court could do, would be to construe the acts of the state. It seems to us, therefore, to follow, that there never has been any legislation conferring upon the riparian owners any title to the lands below high water mark; the right which he takes from the state, if he takes any, is a license and not a title, and being a license is revocable at any time before exercise, and in this case any such license would have been revoked by the act of legislature conferring the title upon the City of Mobile.

Probably no better considered case will be found than that of Stevens vs. The P. & N. R. R., 34 N. J. L., 544 6, where after an elaborate review of the authorities, the positions taken by us were fully vindicated and it was thoroughly established that the right to wharf out was mere license, at all times revocable by the State. It is there said;

"From these authorities and many others which might be cited, it appears to me to be plain, that by the rules of the ancient law, the owner of land along the shore was entitled to no right as an incident of such township, except the contingent ones before referred to of alluvion and dereliction; and that, on the other hand, the title to the soil under tide water was in the sovereign: and that such title was attended with the usual

concomitants of the ownership of reality. And it consequently follows from this result, that in order to enable the owner of the upland to fill in or wharf out below the line of high water, it was absolutely necessary to adopt some principle different from those of the common law. And this, as I understand, was the foundation on which the majority in this court placed themselves in the decision of the case of Gough vs. Bell. That final decision was a concurance in the view expressed by Chief Justice Green, in his opinion delivered in the Supreme Court; and that view was, as I apprehend, the only one which could invest the claim of the land owner to extend his lands by artificial means below the line of high water with the faintest semblance of legality. As such claim could not rest on the common law, it was indispensable to invoke and sanction a custom or local usage variant from the common law. How far such a custom, as a mode of acquiring a title to real estate, can be made to harmonize with legal principles, it is not necessary to inquire, for as before remarked, I consider the existence and legality of such a usage to be res adjudicata in this State. Admitting its legal existence, then, the inquiry presses as to its effect in law. It confers a right, by the legal exercise of which the bank owner may encroach on the public property between high and low water marks. If such a right existed by force of the common law, as an incident of property, it is obvious it could not be destroyed or substantially impaired by the legislative power, without compensation. The question is, whether this customary right has the same quality and efficiency as though it appertained to the land by force of the common law.

"My consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the land owner, enabling the latter to fill in or wharf out along the fore shore between high and low water marks, and which license, when executed, became irrevocable. The shore owner

acquired his indefeasible right by the acquiescence of the public in the performance of the act. That this was the view of the judges whose opinions prevailed in the decision of Gough vs. Bell is, I think, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief Justice Green. In that opinion, this clear statement with respect to the necessity of the execution of the license, as a pre-requisite to the acquisition of a legal right on the part of the land owner is to be found, viz: 'In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line. That every encroachment upon the shore or other part of the public domain may, at all times, be restricted or controlled by the legislature, is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But in the absence of such legislative restriction, where no nuisance is created, the riparian proprietor may appropriate the shore between high and low water mark to his own use.' This language is too clear and explicit to need explanatory comment. That the local custom of the state which was recognized and enforced by the court, operated as a simple license to the riparian owner to enlarge his possessions at the expense of the public domain, and which license was revocable at any time before execution, is the clear doctrine of the adjudication in question: It has no reach beyond this. And from that time to the present, I do not perceive that the judiciary of this state have been in any doubt upon this subject."

Indeed, the state may grant to any individual the right to wharf out upon the shores of another's land without compensation to latter. This is no violation of the riparian owner's rights.

(Mississippi)—Martin vs. O'Brien, 34 Miss., 22.
(West Virginia)—Ravenswood vs. Fleming, 22 W. Va., 52.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, 2 Wash., 531. (27 Pac., 550).

The right to wharf out rests upon passive or implied license merely. The state may regulate it, or even prohibit it.

(Wisconsin)—Cohn vs. Wausaw Boom Co., 42 Wis., 302.
" Diedrich vs. R. R. Co., 42 Wis., 262.

(Washington)—Eisenbach vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, 2 Wash., 531. (27 Pac., 550).

(Connecticut)—State vs. Sargent, 45 Conn., 358.
(Iowa)—Musser vs. Hershey, 47 Iowa, 361-2.
(New Jersey)—Stevens vs. P. & N. R. R., 5 Vroom, (N. J.) 532.
" Keyport, &c., Co. vs. Farmer's Transp. Co., 3 C. E. Green, (N. J.) 511.

In the case of Shively vs. Bowlby, the title of the grantee of the State was upheld. 152 U. S., 1.

We have devoted great labor to the investigation of this question, and we have not seen a single case in which the right of a patentee from the United States Government to the land below high-water mark, where the patent was issued subsequent to the admission of the State into the union, was ever upheld as against the State or its assignee. Even in streams above tide water the riparian owner has been allowed to hold—when at all—only upon the presumption of a grant or license by the State and never against the will of the State.

In this case the objection is made by the State itself, or its grantee, there having been an express revocation of any license that might otherwise have been implied by an express grant by the State to the city prior to the exercise of any right, or supposed right, on the part of the patentee.

But the Grant under which the Plaintiff in Error claims was by fixed boundaries and did not follow.

It ought, however, to be observed that under the particular grant under which the plaintiff in error claims, the grantees never took to the water's edge, but that their boundaries were fixed by metes and bounds, and it seems to be thoroughly settled that where the land has fixed bounds and metes other than the water's edge, it carries with it no right to the shore below the boundary, or to accretions, or other riparian rights. This is because it is altogether a matter as to whether the grantor owns the riparian rights, and intends to convey them. In the case of Hoboken vs. Pa. R. R. Co., 124 U. S , 690, it was said by the Supreme Court of the United States that the right of accretions passes to the adjoining owner only because it is within the description of the grant, and where the description is by metes and bounds, they control.

City of Mobile vs. Eslava, 8 Porter, 577.
Ellinger vs. Mo. Pac. Rwy., 20 S. W., 800.
Pollard vs. Files, 2 How., 707.
Mayor & Aldermen vs. Eslava, 9 Porter, 577
Fulton vs. Frendolig, 63 Texas, 330.
James vs. Howell, 41 Ohio State, 693.
Cook vs. McClure, 58 N. Y., 437.
Sweringen vs. St. L., 52 S. W., 348.
Dunlap vs. Stetson, Fed. Cas., 4164.
1 Amer. & Eng Enc. of Law, 473 note. (2nd Ed)
Hoboken vs. Penn. R. R., 124 U. S., 690.

The power of the State of Alabama to grant these lands to the City of Mobile. No Interference with Commerce.

The plaintiff in error has, we think, suffered himself to confuse the idea of practical interference with navigation and the consequent interference with interstate commerce with the idea of the power of the State owning the shore of the naviga-

ble stream to transfer its title to a municipal corporation or private individual. With a supervision of the former question in streams that are navigable for interstate commerce, the federal courts are vested with jurisdiction by that provision of the federal constitution which confers upon Congress the power to regulate commerce between the States, but there is no provision in the federal constitution whatsoever, which vests the federal court with authority to review the opinion of the State courts in regard to any disposition of the shores, or the soil under the navigable stream within the State, which does not operate as a practical and actual interfereence with navigation.

A State may in fact authorize even an obstruction to commerce, in the absence of any exercise of congressional authority.

Leovy vs. United States, 177 U. S., 629.
Wilson vs. Blackbird Creek, 2 Peters, 245.
Withers vs. Buckley, 20 How., 84.
Cardwell vs. American Bridge Co., 113 U. S., 205.
Williamette Bridge Co. vs. Hatch, 125 U. S., 1.
Shively vs. Bowlby, 152 U. S., 133.

And indeed, Congress has never undertaken to exercise any authority over navigable streams above the established channel line.

Leovy vs. United States, 177 U. S., 629; see also
The act of March 3, 1899, 53rd Congressional session, third chapter, 435, sections 9 and 10, page 1151.

It is to be observed as to what is pointed out in the case of Levy vs. U. S., 629, that the control of the federal court over navigation does not arise out of any constitutional provision relating thereto, and does seem itself, therefore, to relate to the title to the land or the possession thereof, but refers only to the matter of regulating commerce between the foreign nations and between the states and extends only to those things which interfere therewith. It does not relate to the uses of the shore which are not inconsistent with such navi-

gation or commerce. This is altogether a question for the state authority.

Water Power Co. vs. Water Commissioners, 168 U.S., 358.
Packer vs. Bird, 137 U. S., 661.
St. Louis vs. Rutz, 138 U. S., 226.
Kaukauna Water Power Co. vs. Green Bay Co., 142 U. S., 254.

The case of the I. C. R. R. Co. vs. Ill., 146 U. S. 387, is relied upon by the appellant to establish the proposition that it was not competent for the Legislature of the State of Alabama to convey to the city of Mobile the lands in question. That case when closely examined, however, is very far from so holding. It may be conceded it is true, that the effect of the case is to limit a grant of this kind in character to a license, revocable by the State, in so far as it extends beyond the point of practical navigability of the stream. It is, however, expressly held in that case that a grant by the State even to a private individual, would be entirely valid down to the line where the stream is practically navigable, and that beyond this, even the bed of the lake could be granted to a private corporation, although this grant would remain revocable at the election of the State. In that case, on page 435, it is said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the States. *This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.*"

There is absolutely nothing in this case to justify the belief that the state could not grant to the city the land to the channel line in absolute fee simple, or even grant to the City of Mobile, the land below this line, although this portion of the grant might be revocable.

It will be observed, as was pointed out in the opinion of the Supreme Court of Alabama, that far from constituting a hindrance to navigation or commerce, the grant to the City of Mobile had for its very object the furtherance thereof; that it was in performance and preservation of the public trust that the grant was made.

Indeed, to hold that a wharf could not be owned either by the city, or by private owners would be ruinous to the commerce of the State of Alabama. The State of Alabama has never erected any wharves of its own, and such a holding would prevent their erection in the future by municipalities or private persons or corporations and thereby render Alabama's only port entirely unavailable.

The right of disposition of land by the state to the channel of the river seems to be settled in Shiveley vs. Bowlby, 152 U. S., 46-7.

C. J. Taney in Goodtitle vs. Kibbe, 9 How., 478, speaking of the power of the government to convey this very shore said:

"Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant *before Alabama became a State.* But this was not done."

"If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin vs. Waddell, 16 Pet., 367; Pollard vs. Hagan, 3 How., 212; and Goodtitle vs. Kibbe, 9 How., 471. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters."

The paragraph last above we have quoted from Packer vs. Bird, 137 U. S., 671, where it is quoted from Barney vs. Keokuk, 94 U. S., 324.

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated; if a State has been organized and established there. * * * * The State may even dispose of the ursufruct of such lands, as is frequently done by

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leasing oyster beds in them and granting fisheries in particular localities; also *by the reclamation of submerged flats,* and the erection of wharves and piers and other adventitious aids of commerce. Sometimes, large arears so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce."

Hardin vs. Jordan, 140 U. S., 381-2.

The Supreme Court of the United States, in Hoboken vs. Penn., R. R. Co., 124 U. S., 690, after quoting with approval from Stevens vs. P. & N. R. R., 34 N. J. Law, 532, summed up the quotation thus:

"It was therefore, held in that case that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide water below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water and that without compensation to him for the loss."

See State vs. Jersey City, 25 N. J. L., 525.
People vs. Canal Co., 33 N. Y., 466-7.

The state may grant a right of way to a railroad to construct its road between low and high water marks, and the fact that this interferes with the riparian owner's access to the water does not give him a right of action. His right to use the waters is his, as a member of the community, and not as riparian proprietor, and this community is subject to sacrifice by legislative act for the public good.

Gould vs. Hudson River R. R. Co., 6 N. Y., 522.

The state has power to make an absolute grant of the title to submerged lands to the city or to any third person.

Knight vs. U. S. Land Co., 142 U S., 183.

Lowndes vs. Huntington, 153 U. S., 59.

(Alabama.)—Hagan vs. Campbell & Cleveland, 8 Port., 25.

City of Mobile vs. Eslava, 9 Port, (Ala.) 578, S. C., 16 Pet., U. S., 251.

(California.)—Eldridge vs. Cowell, 4 Cal., 87.
" Ward vs. Mulford, 32 Cal., 366.
" Chapin vs. Bourne, 8 Cal., 295-6.
" Dana vs. Jackson-street Wharf Co., 3 Cal., 138, S. C. 89, Am. Desc. 164.

(Connecticut.)—East Haven vs. Hemingvay, 7 Conn., 198.
" Simmons vs. French, 25 Conn., 346.

(New Jersey.)—Gough vs. Bell, 1 Zab., 157.
" State vs. Jersey City, 1 Dutch, 525.
" State vs. Brown, 3 Dutch, 14.
" State vs. Collector, 4 Zab., 108.
" Keyport & C. Co. vs. Farmers' Tranp. Co., 3 C. E., Gr., 511.

(New York.)—Gould vs. H. R. R. Co., 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 528.
" Williams vs. Mayor, 105 N. Y., 420. (11 N. E. 829.)

(Ohio.)—Blanchwood vs. Porter, 11 Ohio, 138.

(Texas.)—Mayor of Galveston vs. Menard, 23 Tex., 349.

(Virginia.)—McCready vs. Commonwealth, 27 Grattan, 985.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash., 236. (S. C., 26 Pac. R., 539.)
" Morse vs. O'Connell, 7 Wash., 119. (S. C., 34, Pac. R., 426.)
" State vs. Prosser, 27 Pac. R., 550.

(Wisconsin.)—Wisconsin R. I. Co. vs. Lyons, 30 Wis., 65.
" Cohn vs. Wausau Broom Co., 47 Wis., 34-35. (2 N., 546.)

(Mississippi.)—Martin vs. O'Brien, 34 Miss., 22.

From what we have said and from the authorities which we have cited, it seems to us to be clear, that it is competent for the state to convey to a city the title of the shore and bed of navigable rivers within its bounds, certainly where, as in this case, the grant is for the benefit of the public, although we do not think that the doctrine is limited to such cases. We think it also apparent that such a grant does not interfere with commerce, but is, as the Supreme Court has declared, in advancement of commerce. We believe that the contrary doctrine would strike down nearly every wharf in the navigable waters of the United States. Be this as it may,

THE PLAINTIFF IN ERROR IS NOT IN A POSITION TO RAISE THE QUESTION.

If the Supreme Court of the United States possesses any jurisdiction over this case, by reason of any objection to the state conveying the title to the shore on the Mobile River, to the City of Mobile, it must be because such a conveyance is unconstitutional as an interference with interstate commerce. We do not understand that the constitutional objection to a grant by a state can be raised by any person who happens to desire to defeat the title of the grantee.

In the first place, the constitutionality of an act of the legislature should never be passed upon until it becomes necessary to the decission of the cause.

Smith vs. Speed, 50 Ala., 276.
Jones vs. Black, 48 Ala., 540.
Joiner vs. Winston, 68 Ala., 129.

It is not necessary, in this cause, to consider the question as to whether this act of the legislature is constitutional or not. The defendant in the case claims title to the lands in question under a patent from the United States Government, which was issued subsequent to the time that the United States Government had parted with its title to the State of Alabama. It has no title, therefore, to the lands in question, whether the act of the legislature granting these lands to the City of Mobile is valid or void. If the act is valid, the city has the title; if the act is void, then the state still retains the title. In neither event has the defendant any title. The defendant's rights to the lands in question were not, therefore, affected in any manner by the grant to these lands from the state to the city, and it is thoroughly settled both in Alabama and elsewhere that the court will not "listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specifically affect. An act of the legislature will be assumed to be valid until some one complains, whose rights it invades; and it is only when some per-

son attempts to resist its operation and calls in the aid of the judicial power to pronounce it void *as to him, his property or his rights,* that the objection of constitutionality can be presented and sustained"

Jones vs. Black, 48 Ala., 540.
Shehane vs. Bailey, 110 Ala., 310.

In the case of Dejarnett vs. Haynes, 23 Miss., 603, which is cited with approval in Jones vs. Black, supra, the court said: "To entitle a party to insist upon the unconstitutionality of a law on the ground that it affects or impairs a right secured to him by the constitution, it must first be shown that he has the right. What right can be affected by the law in this case? We answer, only the title of Hubbard and Greene. Has the plaintiff shown that he has acquired either their title or possession under them? Certainly not. He has, therefore, failed to exhibit to the court any right which could be invaded by the legislature. No one but the party or person claiming under him, whose rights are affected by an act of the legislature, can plead its unconstitutionality."

In the case of St. Clair vs. Jackson, 8 Cowen Reports, 543, opinion pages 678-9, which was an action of ejectment, it is expressly decided that the defendant can not set up the unconstitutionality of an act of the legislature under which the plaintiff obtains his title from a third person. This opinion is directly in line, and is exceedingly interesting.

Speaking of this matter, in the case of Wellington et als, Petitioners, the Supreme Court of Massachusetts, 16 Pickering, 96, said: "Perhaps, however, it may well be doubted, whether a formal act of the legislature can ever with strict legal propriety be said to be void; it seems more consistent with the nature of the snbject, and the principles applicable to analagous cases to treat it as voidable. But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and this injuriously affects

the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected. *Prima facie* and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attemps to resist its operation and calls in the aid of judicial powers, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained."

In the case of People vs. Brooklyn & Coney Island R. R. Co., 89 N. Y., page 73, opinion page 93, the same doctrine is asserted. See also People vs. Turner, 2 N. Y., Sup., page 253.

In the case of Jackson vs. Hudson, 3 Johnson Reports, 375, which was an action of ejectment, the court said: "The policy, or the abstract right of granting lands in the possession to the native *Indians*, without their previous consent as original lords of the soil is a political question with which we have, at present, nothing to do. It cannot arise or be discussed in a contest between two of our own citizens neither of whom deduce any title from the *Indians*. What would be the effect of an *Indian* possession or title in opposition to the grant under the patent, if they were to be brought into collision, is not a question before us."

THE OTHER QUESTIONS IN THE CASE ARE NOT FEDERAL.

All the other questions in the case relate only to whether the act of the Legislature of Alabama was valid under the constitution of the State of Alabama; whether the statute of limitations of Alabama was applicable to public property held by municipal corporations, and whether a city is estopped by the unauthorized acts of its Tax Collector; whether an estoppel can be pleaded in a common law court of ejectment. Over these questions the Supreme Court of the United States has no jurisdiction whatever, the decision of the State courts being final.

Respectfully submitted,

HARRY T. SMITH,

Attorney for Defendant in Error.

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Smith & Smith - Smith for D. C.

Filed May 18, 1902.

No. 274

Supreme Court of the United States.

OCTOBER TERM, 1901, No. 274.

MOBILE TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE,

DEFENDANT IN ERROR.

Brief

FOR THE PLAINTIFF IN ERROR BY HARRY T. SMITH AND GREGORY L. SMITH.

No.....

Supreme Court of the United States.

OCTOBER TERM, 1901, No. 274.

MOBILE TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE,

DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR BY HARRY T. SMITH AND GREGORY L. SMITH.

The action was ejectment brought by the defendant in error against the plaintiff in error, to recover a portion of the shore and bed of the Mobile river, situate in the City of Mobile, Alabama, between the high water mark and the channel line or point of practical navigability as established by the Mobile River Commission.

QUESTIONS PRESENTED.

First. The defendant in error, who was the plaintiff in the trial court and the appellee in the Supreme Court of Alabama, claimed, and both the trial court and the Supreme Court of Alabama held: (a) That the shore and bed of Mobile River, which is a navigable stream in which the tide ebbs and flows, passed out of the United States and into the State of Alabama by virtue of the compact under which the State of Alabama was admitted into the Union in 1819, and that this title passed from the State

of Alabama to the City of Mobile by virtue of the acts of the Legislature of that State, which were in words and figures as fol'ows:

"An Act Granting the City of Mobile the Riparian Rights in the River Front.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the shore and the soil under Mobile River, situated within the boundary lines of the City of Mobile, as defined and set forth in section two of 'An act to incorporate the City of Mobile,' approved February 2d, 1866 be and the same is hereby granted and delivered to the City of Mobile.

"Sec. 2. Be it further enacted, That the mayor, aldermen and common council of the City of Mobile be and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

"Approved, January 31, 1867."

"An Act to amend an Act entitled "An Act to fix the right of the City of Mobile to certain real estate." Approved February 18th, 1895.

"Sec. 1. Be it enacted by the General Assembly of Alabama, That an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate,' approved February 18th, 1895, be, and the same is hereby amended so as to read as follows:

"Sec. 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining or incidental, to any real estate, of any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the City of Mobile or in the Port of Mobile, or in the present City of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the City of Mobile, is hereby vested absolutely, and unconditionally in the City of Mobile, to be by it held, managed, controlled and disposed of as to it may seem best.

"Sec. 2. Be it further enacted, That the said City of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part of the whole, of such property and the rights hereby vested in it and may if it thinks proper to do so, convey to such person or persons an interest in said property,

and rights, as compensation for his or their services in such matters.

"Approved, December 5th, 1896."

The defendant in error also claimed, and the trial court and the Supreme Court of Alabama also held:

(b) That the title to these lands, having passed out of the United States and into the State in 1819, no title could be obtained by the plaintiff in error, or those under whom it claims, by virtue of the patent which the United States' Government *subsequently* issued to Poe, Robertson and McCloskey; (record page 47); (c) That any incomplete, Spanish grant, would have required confirmation on the part of the United States in order to give it validity, and that such confirmations operate only from the date of the patent issued on account thereof, and that therefore, all evidence as to the report of an incomplete Spanish grant, and of a patent issued in 1836 and all deeds from the patentees down to the plaintiff in error, were irrelevant and immaterial, since they began with a grant from the United States' Government subsequent to the time that it had parted with its title.

We note, in passing, also that there was no proof of the existence of a Spanish grant, the only evidence offered being the report of Commissioner Crawford. This established that the commissioner made the report, but it did not establish the truth of any fact stated in the report, nor did the report set forth the existence of such a grant.

> Richard J. Watkins vs. The Lessees of Oliver Holman, 16 Pet., page 25.

These deeds were inadmissable for several other reasons, including the fact that they did not convey, or purport to convey, the lands which are the subject matter of the litigation, but we shall hereafter speak of the case as if these objections did not exist.

(d) The defendant in error claimed, and the trial court and the Supreme Court of Alabama held, that a patent from the

United States to land bounded by the tide waters of Alabama confers no title below high water mark, and that, therefore, the plaintiff in error would have taken no title below the high water mark, even had the patent been issued prior to the grant of the land to the State.

The questions above indicated arose upon the introduction in evidence by the defendant in error of the statutes constituting the compact under which Alabama became a member of the Union and two acts of the General Assembly of Alabama, above quoted, and by the plaintiff in error offering in evidence, and the court excluding from the jury, a long list of conveyances purporting to pass the title from the United States' Government in in 1836 down to the defendant in error, the patent in question and all of the early conveyances describing the land as bounded by the tidal stream. The court excluded these conveyances from the evidence, and gave the general affirmative charge in favor of the defendant in error. These rulings were assigned for error in the Supreme Court of Alabama, and are now understood by the defendant in error to constitute the basis of the following assignments of error in this court, viz: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 36, 37, 52, 54, 55, 56, 57, and 58.

Second. (a) The defendant in error claimed and the trial court and the Supreme Court of Alabama held, that the owner of the upland upon a tidal stream had no right of wharfage unless as a license from the state, (b) that in Alabama no such license has ever been granted; (c) and that even where it is granted by the State, it is revocable, and that it would have been revoked in this instance by the grant to the City of Mobile in 1867.

The plaintiff in error contends, as we understand, (1) that such a license was granted by the State; (2) that the license was acted upon before its revocation; (3) that when such a license is executed it becomes irrevocable or in other words that it has acquired this right by estoppel, both in the building of

improvements and in the payment of taxes; (4) that it has acquired title or at least the right of possession by adverse possession.

These several questions indicated in this paragraph are supposed by the plaintiff in error to have been presented by the rulings of the trial court in excluding the evidence which it offered, tending to show the driving of some piles in front of the land and the erection of some improvements upon the upland bounded thereby, at some date not shown by the evidence offered, or by any statement of counsel; and also by the exclusion of the evidence offered by the plaintiff in error tending to show that it had paid certain municipal taxes upon the land to the defendant in error. These questions are sought to be brought before this court, as we understand, by the following assignments of error, that is to say: 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 35, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, and 53.

Third. The plaintiff in error likewise contends (a) that ejectment is not the proper remedy, (assignments of error 1 to 5) and (b) that the City of Mobile was dissolved and abolished and no longer exists, and that the lands of the City reverted to the State.

We do not think that the question last indicated has ever been presented, but it is attempted to raise it by the ninth assignment of error. The statute therein referred to constituting, as it does, a new charter for the City of Mobile is too long to be here inserted. It constitutes, however, nothing more, nor less than, an amendment to the charter of the defendant in error, which is a municipal corporation.

The ingenuity of counsel will doubtless bring forward other contentions on behalf of the plaintiff in error, but the above constitutes a list of such as the writer has heard, or is able to discover from the record. Amongst them, there appears to the writer to be but three federal questions, and those so old and so often thrashed over by this court, that their discussion upon

principle, is no longer interesting or profitable, namely, (1) did the State of Alabama obtain the title to the shore and bed of the Mobile river, which is a nazigable stream where the tide ebbs and flows, by virtue of the compact under which it became a member of the Union? (2) What title did the subsequent patentee of the United States acquire? (3) Could the State convey its title to the City?

The questions as to the riparian rights of the upland owner whether that of wharfage, accretions, or what not, acquired from the State, whether by grant, license or estoppel, are not believed to be federal in their nature, so long as they do not interfere with interstate commerce, notwithstanding the fact that they have been frequently discussed in this court upon writs of error from the State courts of final resort.

We are not unaware of the decisions of this court to the effect that it will not review the decisions of the State courts of final resort, even upon federal questions which are not necessarily involved in the decision of the State court, and that the construction and application of State statutes by the State courts do not present federal questions; nor have we overlooked the fact that most, if not all, of the contensions of the plaintiff in error to which we have undertaken to reply fall under the ban of these decisions. We shall discuss them, however, not only from the consciousness that we may be in error as to such jurisdictional questions, but because we would waive all jurisdictional questions, if jurisdictional questions could be waived, and have every question attempted to be raised fully decided by this court, their decision being necessary or at least desirable on account of similar litigations now pending in the lower federal courts.

From this, however, we except the question of adverse possession, because, as will appear, the contention of the plaintiff in error is based upon nothing which is really in the case.

ARGUMENT.

No Spanish Grant.

It is not denied that if the Spanish Government had owned and granted these lands to the plaintiff in error or its grantors while it held the title to the land, this grant would have been valid and conclusive. To have this effect, however, the grant must have been complete. But in this case Spain did not own the land and there was no Spanish grant and if there had been the evidence offered would not have been competent to prove it. This evidence was nothing more nor less than a report by a government commissioner to the effect that Bernoudy *claimed* to hold such a grant in an imperfect and incomplete condition. The report does not even identify the land in question as a part of the alleged incomplete grant.

There was no proof of the existence of a Spanish grant, the only evidence offered being the report of Commissioner Crawford. This established that the commissioner made the report, but it did not establish the truth of any fact stated in the report, nor did the report set forth the existence of such a grant.

> Richard J. Watkins vs. The Lessees of Oliver Holman, 16 Pet., page 25.

That, however, such an alleged grant does not in any manner or to any extent, strengthen the title of the patentee is too well settled by authority to need further comment upon principle.

"Undoutedly congress might have granted this land to the patentee or confirmed his Spanish grant before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States, over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty or dominion over it had become vested in the State."

> Goodtitle vs. Kibbe, 9 How., 478.
> Shively vs. Bowlby, 152 U. S., 28.

The plaintiff in error's alleged title is founded upon the report of the commissioner and act of Congress confirmatory thereof, and not upon any Spanish grant.

Doe (Chastang) vs. Dill, 19 Ala., 421.
Hall vs. Root, 19 Ala., 378.
Menard's Heirs vs. Massey, 8 Howard, 308.
Chastang vs. Armstrong, 20 Ala., 609.

A confirmation act, passed by Congress in 1836, does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself or a board of commissioners or the District Court, acting under its authority.

LesBois vs. Bramell, 4 How., 449.

The treaty of 1819 with Spain confirms by its own language all grants of Spain theretofore made of lands in the territory which confessedly belonged to Spain, that is, east of the Perdido river. As to lands west of that river, the treaty does not operate, for the United States has always resisted Spain's claim and the treaty itself declares that Spain's claim was not valid.

Garcia vs. Lee, 12 Peters, 511.
Pollard vs. Files, 2 How., 602.

When a party has a complete title under the Spanish grant no confirmation by the United States can add any strength to the title.

Doe vs. Eslava, 9 How., 445.

Perfect titles made by Spain before January 24th, 1818, are intrinsically valid and *exempt* from the provision of the treaty between Spain and the United States ceding Florida; and they need no sanction from the legislature or judicial departments of this country.

U. S. vs. Wiggins, 14 Peters, 350.

We might add, however, that a Spanish grant, even if perfect and conveying lands owned by the government on a tidal stream by which the grant is bounded, passes no title below the high water line.

Did the title to the land pass from the United States to the State at the time of its admission into the Union? Did a patent issued subsequent thereto in confirmation of an incomplete Spanish grant, take precedence over the title of the State? Does a patent from the United States subsequent to the admission of the State into the Union, conveying land bounded by a tidal stream extend the grant below high water mark? The discussion of these questions ends on page 24.

That the shores and beds of all navigable streams within the limits of the State, became the property of the State by virtue of the act of its admission into the Union, ought no longer to be questioned.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.
Shively vs. Bowlby, 152 U. S , 55.
Water Power Co. vs. Water Commrs., 168 U. S., 357.

It is both interesting and important, if not entirely conclusive of this case, to note that prior to the issuance of the patent upon which the plaintiff in error relies, the Congress of the United States undertook by the act of May 26th, 1824, to convey these lands directly to the City of Mobile and that the City of Mobile brought suit for the recovery thereof against those who were then in possession, and that the city was defeated in these suits upon the simple ground that the United States Government had parted with the title to these lands in the year 1819, by virtue of the compact under which the State of Alabama was admitted into the union, and that the title was therefore in the State and could not therefore be conveyed by the United States Government. The validity of the act of Congress in other respects was in no manner questioned; the power of the government to convey such lands when it possessed the title thereto was not doubted; but both the Supreme Court of Alabama and the Supreme Court of the United States explicitly decided that the city could not obtain a title from the United States Government in 1824 to land which the government had conveyed to the State in 1819, and

yet it is now contended that the United States Government could and did convey the title to these lands to those under whom the plaintiff in error claims, *in the year* 1836. It was because the United States Government had undertaken to convey these lands to the City of Mobile, and because it had been held by the Supreme court of Alabama in the City of Mobile against Eslava, 9th Porter, 578, and by the Supreme Court of the United States in Pollard vs. Hagan, 3rd Howard, 212; in the City of Mobile vs. Eslava, 16th Peters, 240, and in Goodtitle vs. Kibbe, 9th Howard, 471, that the title to these lands was vested in the State of Alabama, and in order to carry out the purpose of the act of Congress of May 26th, 1824, that the Legislature of the State of Alabama passed the act of January 31st, 1867, Acts of Alabama, 1866-7, p. 307. (Record, p. 45 and 46.)

It would certainly now be a most curious result should the City of Mobile be held not to be entitled to these lands by reason of the denial of the very fact the existence of which was, in these cases held to defeat the grant from the United States Government to the City of Mobile.

The decision which is now sought to be reviewed, adhering to the established doctrine in Alabama, as indeed of all the courts where the question has been considered unaffected by the statute, has held that the patent of the United States describing the grant as bounded by a tidal stream, would pass title only to the high-water mark, both because such would be the proper construction of the grant, and because the Federal Government owned no title beyond this point to convey. Before examining into the decisions on this point, however, we beg to cite the following cases as establishing the proposition that the State decisions upon this point are conclusive upon this court.

Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Rutz, 138 U. S., 250.
Water Power Co. vs. Water Comrs., 168 U. S., 357.
Shively vs. Bowlby, 152 U. S., 1.
I. C. R. R. vs. Illinois, 146 N. S., 517.

We have made our investigation exhaustive, and State at the beginning of this argument, that although the questions about to be presented have been repeatedly considered both in England and in almost every State in this union, we have found no case where a grant by the government to an individual, of lands bounded by a *navigable stream where the tide ebbs and flows*, has ever been held to carry the shore below the high water mark; nor does there exist (we believe) a case where the space between high and low water mark even upon a navigable stream *above* the ebb and flow of the tide, was ever held to pass to a patentee of the United States Government under a patent issued subsequent to the admission of the State in which the lands were situate, where as in the case at bar, the State or its assignee was asserting title thereto.

The question first came before the Supreme Court of Alabama, in the case of Mobile vs. Eslava, 9 Porter, 577, where it was held that the title to this land passed from the United States to the State of Alabama in 1819, by virtue of the compact under which Alabama became a member of the Union, and that a subsequent patent from the United States passed no title whatever. This case was cited with approval, and affirmed in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and the doctrine there asserted was re-affirmed by the Supreme Court of Alabama in the later case of Kennedy vs. Bebee, 8 Ala, 909, and in Pollard vs. Greit, 8 Ala., 941.

The case of Mobile vs. Eslava, was appealed to the Supreme Court of the United States, and was by that court affirmed.

16 Peters, 234.

This Alabama doctrine has also been thoroughly established by the Supreme Court of the United States.

Pollard vs. Hagan 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 471.
Hoboken vs. Pa. R. R. Co., 124 U. S., 656.
Shiveley vs. Bowlby, 152 U. S., 55.
Water Power Co, vs. Water Comrs., 168 U. S., 357.
Hallett & Walker vs. Bebee, 13 How., 25.
And other authorities that will be mentioned hereafter.

In Weber vs. Harbor Comrs., 18 Wal., 64, it seems that one who obtained title from the Government which itself had parted with title to the shore, did not become entitled to any riparian rights whatever.

In each of these cases constituting four distinct decisions of the Supreme Court of Alabama, as well as several decisions of the Supreme Court of the United States, the question as to the title of the patentee of the United States government under the patent issued subsequent to the admission of the State into the Union, for the lands between high water mark and low water mark, was distinctly presented. It was the only question in the cases. It was elaborately considered, and unquestionably decided, that neither the United States government, nor a private individual, can grant a title which it does not possess.

Not only is this court bound by the decision of the Supreme Court of Alabama, and not only has the Supreme Court of Alabama frequently decided these questions, but those decisions were right, as we shall attempt to demonstrate. It is said that this doctrine, so firmly settled upon the early judicial history of our State, and which has been again reiterated in the decision of the case at bar, is opposed to the case of Webb vs. Demopolis, 95 Ala., 116.

It would do but little credit to the eminent jurists, who concurred in this opinion, to suppose that it was their intention to overrule several former decisions of their own bench, which had been cited with approval not only by the Supreme Court of Alabama, but repeatedly by the Supreme Court of the United States, and which reasserted the same doctrine at intervals of ten years apart, and this, without even a citation or mention of these cases, or the slightest consideration of the doctrine therein established or the citation of a single case which conflicted with them; it would be indeed unfortunate for the inhabitants of the State of Alabama, if the rules of property which had stood unquestioned for several generations were to be changed without a discussion, or a mention of the former decisions of the

Supreme Court of Alabama by which they had been so repeatedly asserted. These considerations assure us of the conclusions which we have reached, to the effect that these cases do not in the slightest conflict.

It is said in the case of Webb vs. Demopolis, 95 Ala., 129, "whether the grant made by the United States to George S. Gains for the Demopolis Town Company, and which enured to its benefit, of the land upon which the city of Demopolis now stands extended to ordinary high water mark, or to the line of the low water, or to the middlethread of the Tombigbee River, depends therefore upon the rule of property in this respect which Alabama has adopted. The rule which this State has adopted and declared through this court is, that a grant by the United States to land bordering *on a navigable river* includes the shore of bank of SUCH RIVER, and extends to water line thereof at low water." (The emphasizing by capital and italics in this and the following quotations are our own.)

How then are we to reconcile this language with the cases already cited and with the opinion in the case at bar where it has been repeatedly asserted, "that a grant by the United States to lands bordering on a navigable *stream where the tide ebbs and flows extends only to high water mark?*"

The cases are plainly distinguishable upon other grounds to be mentioned hereafter, but the distinction which is made most prominent by the universality of its adoption and that drawn by the cases themselves, is to be found in the fact that in *Webb vs. Demopolis* the court was considering the rights of a riparian owner upon a *navigable river where the tide does not ebb and flow*, while in the cases cited by the plaintiff in error and in the case at bar, the lands in question constitute the shore and the bed of the *tide waters* of the state

The common law of England, so far as it is applicable to our institutions and remains unchanged by our statutes, is the law of Alabama, and from the policy of this law no state in the union has, in this matter, ever departed so as to extend the

rights of a riparian owner. Owing to the fact that in England the rivers above the ebb and flow of the tide are, as a rule, small and unimportant, the title of the riparian owners thereon, was extended to the middle of the stream, while the right of the riparian owner, upon waters where the tide ebbs and flows, was restricted to the high water mark. The rule has never been otherwise in England, and no court either in England or in America has ever extended the common law right of a riparian owner. Some of the states, Alabama amongst them (see Webb vs. Demopolis supra and cases there cited,) have *restricted* the right of a riparian owner upon streams which were in fact *navigable, although above the ebb and flow of the tide.* Some of these states have restricted them to the low water mark; others to the high water mark, while others adhere to the old common law distinction and permit them to hold to the middle of the stream. The difference in the rule which prevails in the several states which adhere to the common law and those which have modified the rule upon our great river, rests entirely upon the difference between them as to what shall constitute the test of navigability. The test most consonant with good sense is that, of course, which has been adopted in Alabama, where it is a question of fact to be determined by the practicable test of whether the stream is actually navigable; many of the states hold to the distinction of the common law. Those states that adopt the Alabama rule hold that the same reason which restricts the riparian owner to high water mark where the tide ebbs and flows, alike operates where the stream is actually navigable, though above the influence of the tide, and therefore restrict him, in some states, to high water mark and in other states to low water mark. The modification of the common law, however, in every case has been a restriction and not an extension of the riparian ownership. The difference between those states which do restrict the upland owner upon a non-tidal stream, grows out of the simple fact that some courts have overlooked the fact that upon non-tidal streams there is really

no established high water mark, since the extent of the rise depends upon the character of the season, while other courts have observed this fact and the consequent inapplicability of the high water mark limit and have therefore restricted the owner to the low water mark, which upon non-tidal streams is the only established line. Where the common law has not been strictly adhered to, it has been—in every case—because the reason which restricted him in England where the tide ebbed and flowed, alike restricted him in America where the *river* was actually navigable.

This, an investigation of the cases will demonstrate, is the rationale of the rule and this is the distinction which existed between the case and the City of Mobile vs. Eslava and that of Webb vs. Demopolis. In other words, the latter case only decides, that in Alabama, the Demopolis Co., was *restricted* to low water mark, although at common law its title would have extended to the centre of the stream; and this because the reason of the rule which restricted the riparian owner where the tide ebbed and flowed, also restricted him to the only established shore line where the river was in fact navigable, though the tide did not ebb and flow. While in Mobile vs. Eslava and in the case at bar the riparian owner, being upon a stream where the tide ebbs and flows, owned at common law only to high water mark and was therefore confined to that limit.

In the case at bar the Supreme Court of Alabama has taken judicial knowledge of the fact that the tide does ebb and flow in the Mobile river throughout our city front. In this it was justified by

12 Amer. & Eng. Enc. (O. S.), 169.
Walker vs. Allen, 72 Ala., 456.
Metzger vs. Post, 15 Vroom, (N. J.), 77.
Cash vs. Auditor of Clarke Co., 7 Ind. 227.

The Federal Court will not construe a grant bounded by a navigable stream as conferring any title below the high water mark, although the State may allow riparian rights below this.

Packer vs. Bird, 137 U. S., 669.

In Shively vs. Bowlby, 152 U. S., 43, it is said:

"By the common law as before remarked, such additions to the land on navigable waters belong to the Crown, but, as *the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide;* that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide waters, found in the monuments of common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and in-land seas; and under the like influence it laid the foundation in many states of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as above remarked, is for the several states themselves to determine."

That the modification of the common law has been a *restriction and not an extension* of the right of the riparian owner is clearly stated in

Packer vs. Byrd, 137 U. S., 666,

where it is said:

"The question presented is, whether the patent of the United States describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by

the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

"It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high water mark. The title to land below that mark in such cases is vested in England in the Crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of considerable extent, are navigable in fact, which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and by vessels larger than any which sailed on the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of the Daniel Ball, 10 Wall., 557, 563: 'They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'

"The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common law doctrine on this subject, prevailing in England, is held in some of the States, but in a larger number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time, has given way, or been greatly modified, under the different conditions there."

Again in 137 U. S., p. 669, it is said:

(Texas)—Mayor of Galveston vs. Menard, 23 Tex., 349.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, id., 531. (27 Pac., 550).
" Morse vs. O'Connell, 7 Wash., 117. (34 Pac., 426).
" Allen vs. Forrest, 8 Wash., & 702. (36 Pac. 971).

There is a dictum to the contrary, in the case of Peck vs. Lockwood, 5 Day, 22 (Conn.) but that was subsequently repudiated in the case of Chapman vs. Kimball, 9 Conn., 40.

The cases in Maine, Massachusetts and New Hampshire are not exceptions to the rule, since the colonial ordinance of 1641, which was in effect a statute, expressly extended the right of riparian proprietor in the soil from high to low water mark.

(Maine)—Parker vs. Cutler, Mildam Co, 20 Me., 357.
" Babson vs Tainter, 10 Atlantic Rep, 63.
(Massachusetts)—Mayhew vs. Norton, 17 Pick., 359.
" Green vs. Chelsea, 24 Pick., 77.
" Salstonstall vs Proprietors, 7 Cushing, 195.
" Boston vs. Richardson, 105 Mass., 354.
(New Hampshire)—Clements vs. Burns, 43 N. H, 609, 621.
" Nudd vs. Hobbs, 17 N. H., 524.

The writer is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark if such a thing exists upon non-tidal streams; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to furnish no test whatever. Far from complaining that our court has abandoned the test in part, we are quite sure that the logical solution of the question if the writer is wrong in supposing that there is really no such thing as a high-water line on non-tidal

stream, is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows.

McManus vs. Carmichael, 3 Iowa, 1.

People vs. Canal Co., 33 N. Y.. 466-7.

The abandonment of an erroneous rule—one founded upon the topography of England and utterly inapplicable to America—should be entire and not partial.

To restrict the owner to high-water mark wherever there is such and the river is actually navigable is the logical rule and that which is approved by the Supreme Court of the United States.

Barney vs. Keokuk, 94 U. S , 324.
Packer vs. Byrd, 137 U S., 671.

But there are other grounds upon which we may reconcile Mobile vs. Eslava, 9 Port., 603.

Goodtitle vs. Kibbe., 1 Ala., 403.
Pollard vs. Greit, 8 Ala., 940.
Kennedy vs. Bebee, 8 Ala., 914.

and the many cases in the Supreme Court of the United States with the cases of Webb vs Demopolis and those upon which it rests, and upon which we may justly claim that these later decisions do not affect the case at bar.

It seems to us to be clear, thar since the grant which was construed in the case of Webb vs. Demopolis, was a grant by the United States Government before the admission of the State into the Union, this case has no application whatever. There the title to the land in question had never been conveyed to the State. The question therefore as to how far the title extended was only a question of construction, or of intent. The grantor in the instrument to be construed in those cases, held at the time of the grant, the title to the land not only down to the high

water mark, but also to low water mark. The question in the present case is a question of the power of the United States Government to grant what it did not possess. The question as to the effect of the grant by the United States Government describing the lands as far as the low water mark, but made at a time when the government possessed no title below high water mark, was not presented in the case of Webb vs. Demopolis, and ought not to have been, and was not decided in that case. On the contrary, in the case of the City of Mobile vs. Eslava, 9 Porter, 603, and in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and in the case of Pollard vs. Greit, 8 Ala., 940, and in the case of Kennedy vs. Bebee, 8 Ala , 914, and in the several decisions of the Supreme Court of the United States, the question was, as it is here, not only as to what land was described in the patent, but also as to what effect was to be given to a patent issued by the United States Government to land which it had already conveyed to the State of Alabama, and to which it therefore possessed no title. In all of these decisions it was expressly desided that where the United States Government had parted with its title to the land to the State of Alabama, by admission of the State into the Union, as it did with all shores of navigable streams not already disposed of, a subsequent patent by the United States Government was wholly void, and passed no title, that is to say, it neither passed the title from the United States Government nor operated to pass the title out of the State, and in each of these cases it was distinctly held that the patentee of the United States Government could not maintain ejectment for the possession of the property.

Pollard vs. Hagan, 3 Howard, 212
Goodtitle vs. Kibbe, 9 Howard, 471.

What we have said seems to us to demonstrate that the case of Webb vs. Demopolis, 95 Ala., 126-7, is in nowise in conflict with the doctrine formerly established in this State in Mobile vs. Eslava, 9 Port, 577.

The only cases cited by Webb vs. Demopolis, in the 95th Alabama, were those of

Williams vs. Glover, 66 Ala., 189.
City of Demopolis vs. Webb, 87 Ala., 670.
Doe vs. James, 11 Ala., 63.

None of these cases cite any Alabama cases, with the exception of the case of

Howard vs. Ingersoll, 17 Ala, 790.
Bullock vs. Wilson, 2 Porter, 436.
Mayor of Mobile vs. Eslava, 9 Porter, 577.

Demopolis vs. Webb, 87 Ala., 670, is the same case as Webb vs. Demopolis in the 95th Ala., and this case, therefore, needs no further discussion.

In the case of Williams vs. Glover, it is tersely said "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks." This again was a case where the land in question was upon a navigable river, but above the ebb and flow of the tide. That this authority did not intend to overrule the case of Mobile vs. Eslava in the 9th Porter, is evidenced by the fact that it cites that very case as the authority for the assertion just made. Williams vs. Glover was an action by a landlord against a tenant for rent. The tenant, could not, of course, dispute the title of his landlord to the land described in the lease. He had the right, and the simple right, to raise the question as to the proper construction of the terms of the lease, and whatever the lease described, the landlord was supposed to own, provided, of course, it was susceptible of private ownership. The report does not show upon what title the lanlord relied. This title may have been derived from the State, and not from the United States Government at all, or it may have been derived from the United States before the admission of the State into the Union. The question which is now before the court was not in the slightest involved in the case of Williams vs Glover, and it was not discussed or considered. It is, at most, a dictum that a grant made by the Government which owns the

land and which bounds the grant by the river, above tide waters, would be construed to intend to convey to the low water mark.

The case of Howard vs. Ingersoll, in 17 Ala., 790, is not a case where the construction of a grant to an individual was under consideration. That case involved simply the construction of a treaty, and it was there held that where the dividing line between two states was established as the river line on one side, the line referred to must be supposed to be low water mark. But the ground of this decision is simply a question of convenience in political divisions of government, it being apparent that it would be dangerous, as well as inconvenient, if the jurisdiction of one state should extend across the river up to the high water mark on the other side, while the jurisdiction of the other state extended only as far as high water mark on its own side of the river. If such a construction were given to the treaty, it would of course, create the ownership in one state of a narrow strip of land lying across the river from any other portion of its territory, which would be of such a character that it could not be inhabited, and therefore impossible to police, a result which would, of course, be ruinous. The question as to the effect of the grant by the United States Government of land bounded by a river, or other navigable stream, subsequent to the time when the United States Government had ceased to have any title to the land below high water mark, was not, to any degree, involved in that case, and indeed, it was not even material in that case as to what would have been the proper rule of construction of the individual grant bounded by a river, made by a government while owning the land to the centre of the river. Indeed, in that very case, Chief Justice Dargan said that he did not think it necessary to examine the numerous decisions with which our books abound, and to many of which they had been referred, for the reason that they had reference to the rights of individual owners. *But, however this may be, the river which was in question in Howard vs. Ingersoll, 17 Ala., 790, was not a nav-*

igable stream, and on pages 791 and 792, the chief justice expressly distinguished between the cases which he was considering, and the cases where the land was bounded by navigable water where the tide ebbs and flows.

The case of Kennedy vs. Jones, in 11 Ala., 63, does however, relate to a part of the water front in the City of Mobile, but does not in any manner affect the question under discussion. This decision was rendered by Chief Justice Collier, the same judge who rendered the decision in Eslava vs. City of Mobile, and the subsequent case of Pollard vs. Greit, in 8 Ala., and it would have been queer had he intended to assert anything in conflict with these cases after they had been approved by the Supreme Court of the United States, and without in any manner referring to them, and it is not surprising, therefore, to find that there is nothing whatever in the case of Kennedy vs. Jones, intimating in the slightest degree that the grantee of the United States Government under a patent issued subsequent to the admission of the State into the Union, took any thing below high-water mark. In this case of Kennedy vs. Jones, on the contrary, see pages 84, 85 and 86, it was held that the grant to the soil below high-water mark, had been made by the Spanish Government long before the admission treaty under which the United States Government obtained title to the property in question, and that transfer of the possession of Mobile and the adjacent country from Spain to the United States in 1813, did not interfere with the title below high-water mark, *which had been already expressly granted to the City of Mobile by the Spanish Government.*

In the case of Bullock vs. Wilson, 2 Porter, 445, it was distinctly held that the grantee of the United States Government did not take beyond low-water mark but whether he took between high-water mark and low-water mark was not presented by the facts in the case. The holding in that case was simply to the effect that the riparian owner could not claim below low-water mark, and the court does not discuss the question as to

whether he could go to that extent, or not, that being entirely irrelevant to the case. *In addition to this, this case was not a case of tide water, but the property in question was bounded by the Coosa river.*

These are the only cases decided by the Supreme Court of Alabama, which are relevant to the question in hand, so far as we have been able to discover. A careful reading of these cases will demonstrate that every time that the question now urged upon the court, that is to say, the question as to the effect of the grant by the United States upon land *bounded by tide water*, made by the United States Government, *subsequent* to the admission of the State of Alabama into the Union (including several distinct submissions), the Supreme Court of Alabama has emphatically declared that the title of the patentee of the United States Government extended only to high-water mark.

There is, therefore, no conflict whatever in the decision of the Supreme Court of Alabama.

From what we have said and from the authorities we have cited, it seems to us inevitably to follow that the title to the shore and bed of the Mobile river passed from the United States to to the State, at the time of her admission into the Union, that the patentee of the United States' Government, under a patent issued subsequent to that date, took no title below the high-water mark, and that the extent to which an abutting owner may be allowed to use the shore of a tidal stream upon which his land is bounded, is a question of state policy which cannot be here reviewed or controlled.

THE POWER OF THE STATE OF ALABAMA TO GRANT THESE LANDS TO THE CITY OF MOBILE. NO INTERFERENCE WITH COMMERCE. The discussion of this subject ends on page 32

It is a curious but inevitable result of the contention of the plaintiff in error, that the State had no power by direct grant to convey the lands in question to the City of Mobile, but that the plaintiff in error did, nevertheless, by an indirect act obtain this very title from the State; or, in other words, that it would

be a serious breach of public policy for the state to part with its title to any one, unless it was to the plaintiff in error.

The plaintiff in error has, we think, suffered itself to confuse the idea of practical interference with navigation and the consequent interference with interstate commerce, with the idea of a transfer by the State of its title to the shore of a navigable stream, to a municipal corporation or private individual. Over the former question in streams that are navigable for interstate commerce, the federal courts are vested with jurisdiction by that provision of the federal constitution which confers upon Congress the power to regulate commerce between the States, but there is no provision in the federal constitution whatsoever which vests the federal court with authority to review the decisions of the State courts in regard to any disposition of the shores, or the soil under the navigable stream within the State, which does not operate as a practical and actual interference with navigation or commerce.

A State may in fact authorize even an obstruction to commerce, in the absence of any exercise of congressional authority,

Leovy vs. United States, 177 U. S., 629.
Wilson vs. Blackbird Creek, 2 Peters, 245.
Withers vs. Buckley, 20 How., 84.
Cardwell vs. American Bridge Co., 113 U. S., 205.
Williamette Bridge Co., vs. Hatch, 125, U. S., 1.
Shively vs. Bowlby, 152 U. S., 133.

and indeed, Congress has never undertaken to exercise any authority over navigable streams above the established channel line.

Leovy vs United States, 177 U. S, 629; see also
The act of March 3, 1899, 53rd Congressional session, third chapter, 435, sections 9 and 10, page 1151.

It is to be observed as to what is pointed out in the case of Leovy vs. U. S., 177 U. S., 629, that the control of the federal court over navigation does not arise out of any constitutional provision relating to the title to the land or the possession thereof, but refers only to the matter of regulating commerce between the foreign nations and between the states and extends

only to those things which interfere therewith. It does not relate to the uses of the shore which are not inconsistent with such navigation or commerce. This is altogether a question for the state authority.

Water Power Co. vs. Water Commissioners, 168 U. S., 358.
Packer vs. Bird, 137 U. S., 661.
St. Louis vs. Rutz, 138 U. S., 226.
Kaukauna Water Power Co., vs. Green Bay Co., 142 U. S., 254.

The case of the I. C. R. R. Co. vs. Ill., 146 U. S., 387, is relied upon by the appellant to establish the proposition that it was not competent for the Legislature of the State of Alabama to convey to the City of Mobile the lands in question. That case when closely examined, however, is very far from so holding. It may be conceded it is true, that the effect of the case is to limit a grant of this kind in character to a license, revocable by the State, in so far as it extends beyond the point of practical navigability of the stream. It is, however, expressly held in that case that a grant by the State even to a private individual, would be entirely valid down to the line where the stream is practically navigable, and that beyond this, even the bed of the lake could be granted to a private corporation; although this grant would remain revocable at the election of the State. In that case, on page 435, it is said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the States. *This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.*"

There is absolutely nothing in this case to justify the belief that the state could not grant to the city the land to the channel line in absolute fee simple, or even grant to the City

of Mobile, the land below this line, although this portion of the grant might be revocable.

Upon this view of that case this Court upon the second appeal confirmed the grant by the State to the Railroad Company down to the point of practical navigability, which seems conclusive.

It will be observed, as was pointed out in the opinion of the Supreme Court of Alabama, that far from constituting a hindrance to navigation or commerce, the grant to the City of Mobile had for its very object the furtherance thereof; that it was in performance and preservation of the public trust that the grant was made.

Indeed, to hold that a wharf could not be owned either by the City, or by private owners would be ruinous to the commerce of the State of Alabama. The State of Alabama has never erected any wharves of its own, and such a holding would prevent their erection in the future by municipalities or private persons or corporations acting under grants from the State and thereby render Alabama's only port entirely unavailable.

The right of disposition of land by the State to the channel of the river seems to be settled in Shiveley vs. Bowlby, 152 U. S., 46-7.

C. J. Taney in Goodtitle vs. Kibbe, 9 How., 478, speaking of the power of the government to convey this very shore, said:

"Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant *before Alabama became a State*. But this was not done.

"If they chose to resign to the riparian proprietor rights which properly belonged to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin vs. Waddell, 16 Pet., 367; Pollard vs. Hagan, 3 How., 212; and Goodtitle vs. Kibbe, 9 How., 471. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters."

The paragraph last above we have quoted from Packer vs. Bird, 137 U. S., 671, where it is quoted from Barney vs. Keokuk, 94 U. S., 324.

"With regard to grants of the Government for lands bordering on tide water, it has been distinctly settled that they on extend to high-water mark, and that the title to the shore a lands under water in front of lands so granted enures to t State within which they are situated; if a State has been ganized and established there. * * * * The State m even dispose of the usufruct of such lands, as is frequent done by leasing oyster beds in them and granting fisheries particular localities; also *by the reclamation of submerged flats*, a the erection of wharves and piers and other adventitious aids commerce. Sometimes, large arears so reclaimed are occupi by cities, and are put to other public or private uses, Sta control and ownership therein being supreme, subject only the paramount authority of Congress in making regulations commerce, and in subjecting the lands to the necessities a uses of commerce."

Hardin vs. Jordan, 140 U. S., 381-2.

The Supreme Court of the United States, in Hoboken v Penn. R. R. Co., 124 U. S., 690, after quoting with approv from Stevens vs. P. & N. R. R., 34 N. J. Law, 532, summed u the quotation thus:

"It was therefore, held in that case that it was competer for the legislative power of the State to grant to a stranger lan constituting the shore of a navigable river under tide wat below the high-water mark, to be occupied and used with stru tures and improvements in such a manner as to cut off the acces of the riparian owner from his land to the water and that wit out compensation to him for the loss.."

See State vs. Jersey City, 32 N. J. L., 525.
People vs. Canal Co., 33 N. Y., 466-7.

The State may grant a right of way to a railroad to co struct its road between low and high-water marks, and the fa that this interferes with the riparian owner's access to the wat does not give him a right of action. His right to use the water is his, as a member of the community, and not as riparian pr prietor, and this right is subject to sacrifice by legislative ac for the public good.

Gould vs. Hudson R. R. Co., 6 N. Y., 522.

The State has power to make an absolute grant of the tit to submerged lands to the City or to any third person.

Knight vs. U. S. Land Co., 142, U. S, 183.
Lowndes vs. Huntington, 153 U. S., 59.

(Alabama)—Hagan vs. Campbell & Cleveland, 8 Port., 25.
City of Mobile vs. Eslava, 9 Port., (Ala.) 578, S. C., 16 Pet, U. S., 251.

(California.)—Eldridge vs. Cowell, 4 Cal., 87.
" Ward vs. Mulford, 32 Cal., 366.
" Chapin vs. Bourne, 8 Cal., 295-6.
" Dana vs. Jackson-street Wharf Co., 3 Cal., 138, s. c. 89, Am. Desc. 164.

(Connecticut.)—East Haven vs. Hemingway, 7 Conn., 198.
" Simmons vs. French, 25 Conn., 346.

(New Jersey.)—Gough vs. Bell, 1 Zab., 157.
" State vs. Jersey City, 1 Dutch, 525.
" State vs. Brown, 3 Dutch, 14.
" State vs. Collector, 4 Zab, 108.
" Keyport & C. Co. vs. Farmers' Tranp. Co., 3 C. E., Gr., 511.

(New York.)—Gould vs. H. R. R. Co, 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 528.
" Williams vs. Mayor, 105 N. Y., 420, (11 N. E. 829.)

(Ohio.)—Blanchwood vs. Porter, 11 Ohio, 138.

(Texas.)—Mayor of Galveston vs. Menard, 23 Tex., 349.

(Virginia.)—McCready vs Commonwealth, 27 Grattan, 985.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash., 236. (s. c., 26 Pac. R., 589.
" Morse vs. O'Connell, 7 Wash., 119. (s. c. 34, Pac. R., 426.)
" State vs. Prosser, 27 Pac. R., 550.

(Wisconsin.)—Wisconsin R. I. Co. vs. Lyons, 30 Wis., 65.
" Cohn vs. Wausau Broom Co., 47 Wis, 34-35. (2 N., 546.)

(Mississippi.)—Martin vs. O'Brien, 34 Miss., 22.

THE PLAINTIFF IN ERROR IS NOT IN A POSITION TO RAISE THE QUESTION.

If the Supreme Court of the United States possesses any jurisdiction over this case, by reason of any objection to the state conveying the title to the shore on the Mobile River, to the City of Mobile, it must be because such a conveyance is unconstitutional as an interference with interstate commerce. We do not understand that the constitutional objection to a

grant by a state can be raised by any person who happens to desire to defeat the title of the grantee.

In the first place, the constitutionality of an act of the legislature should never be passed upon until it becomes necessary to the decision of the cause.

Smith vs. Speed, 50 Ala., 276.
Jones vs. Black, 48 Ala., 540.
Joiner vs. Winston, 68 Ala., 129.

It is not necessary, in this cause, to consider the question as to whether this act of the legislature is constitutional or not. The plaintiff in error in the case claims title to the lands in question under a patent from the United States Goverment, which was issued subsequent to the time that the United States Government had parted with its title to the State of Alabama. It has no title, therefore, to the lands in question, whether the act of the legislature granting these lands to the City of Mobile is valid or void. If the act is valid, the city has the title; if the act is void, then the state still retains the title. In neither event has the defendant in error any title. The defendant in errors' rights to the lands in question were not, therefore, affected in any manner by the grant of these lands from the state to the city, and it is thoroughly settled both in Alabama and elsewhere that the court will not "listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specifically affect. An act of the legislature will be assumed to be valid until some one complains, whose rights it invades; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void *as to him, his property or his rights*, that the objection of unconstitutionality can be presented and sustained."

Jones vs. Black, 48 Ala., 540.
Shehane vs Bailey, 110 Ala., 310.

In the case of Dejarnett vs. Haynes, 23 Miss., 603, which is cited with approval in Jones vs. Black, supra, the court said: "To entitle a party to insist upon the unconstitutionality of a

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law on the ground that it affects or impairs a right secured to him by the constitution, it must first be shown that he has the right. What right can be affected by the law in this case? We answer, only the title of Hubbard and Greene. Has the plaintiff shown that he has acquired either their title or possession under them? Certainly not, he has, therefore, failed to exhibit to the court any right which could be invaded by the legislature. No one but the party or person claiming under him, whose rights are affected by an act of the legislature, can plead its unconstitutionality."

In the case of St. Clair vs. Jackson, 8 Cowen Reports, 543, opinion pages 678-9, which was an action of ejectment, it is expressly decided that the defendant can not set up the unconstitutionality of an act of the legislature under which the plaintiff obtains his title from a third person. This opinion is directly in line, and is exceedingly interesting.

Speaking of this matter in the case of Wellington et als, Petitioners, the Supreme Court of Massachusetts, 16 Pickering, 96, said: "Perhaps, however, it may well be doubted, whether a formal act of the legislature can ever with strict legal propropriety be said to be void; it seems more consistent with the nature of the subject, and the principles applicable to analagous cases to treat it as voidable, but whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and this injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected. *Prima facie* and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation and calls in the aid of judicial powers, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained."

In the case of People vs. Brooklyn & Coney Island R. R. Co., 89 N. Y., page 73, opinion page 93, the same doctrine is asserted. See also People vs. Turner, 2 N. Y., Sup., page 253.

In the case of Jackson vs. Hudson, 3 Johnson Reports, 375, which was an action of ejectment, the court said: "The policy or the abstract right of granting lands in the possession to the native *Indians*, without their previous consent as original lords of the soil is a political question with which we have, at present, nothing to do. It cannot arise or be discussed in a contest between two of our own citizens neither of whom deduce any title from the *Indians*. What would be the effect of an *Indian* possession or title in opposition to the grant under the patent, if they were to be brought into collision, is not a question before us."

SECOND.

The Right of Wharfage, Both By License and Accretions.

This discussion ends on page 64.

We are not unconscious of the fact that the plaintiff in error will claim to have undertaken to establish that it had erected a wharf upon the lands in suit, prior to the grant to the city and that the acquiescence of the state operated to confer upon it a license which, when exercised, became irrevocable. This question was never presented either in the trial court or in the Supreme Court of Alabama, for while the plaintiff in error offered evidence of having at one time driven certain pilings, it did not offer to prove that this was before the grant from the state to the city.

There are states, New Jersey for instance, in which it has been held that such a license is granted by the state as a matter of custom, and without any express statute. The doctrine has been referred to and recognized in the case of Shively vs. Bowlby, 152 U. S., page 35. When we cast about, however, for a principle upon which to rest the doctrine that a mere license

when exercised becomes irrevocable (even if we leave out of view the fact that the complainant has really offered no evidence either of the existence of such a license or of its exercise before its revocation,) we inevitably fall upon the doctrine of estoppel. There is no other principle upon which the idea can be supported, and unless the doctrine of estoppel will save such a transaction from the statute of frauds, it is inevitably under its ban. We shall, therefore, inquire as to what just basis there is for the idea that even the building of a wharf in front of the property in question under an express license from the state, would have operated an estoppel against the state from subsequently revoking the license in bringing a suit in ejectment.

Should the doctrine which the plaintiff contends for be established, however, it could become applicable only after it had been established; First, that the plaintiff in error was the abutting owner; Second, that the right of wharfage is a right to exclusive possession; Third, that by common law a license to wharf is vested in the abutting owner, or Fourth, that the State had granted a license which was exercised before revocation. We shall discuss these questions, and then take up the doctrine of estoppel.

(a) *Defendant in error and not plaintiff in error is the abutting owner.*

The plaintiff in error insists, that being the owners of the upland which is bounded by the Mobile River, and having, therefore, a title extending down to the high water mark, they have, as incidental thereto, a right of wharfage, or, in other words, a right to the possession of the shore, and of the land under the water to the channel line of the river, for the purpose of erecting a wharf thereupon, and also the right to accretions.

It is however, always the owner of the shore, and not the owner of the lands abutting on the shore, that possesses the riparian rights, where the title to the shore has been severed from that of the upland.

Dana vs. Jackson, 89 Amer., Desc. 164.

Angel on Tide Waters, 254.
New Orleans vs. United States, 10 Pet., 662.
Gould on Waters, 3rd Ed. sec. 156-7.
Swetinger vs. St. Louis, 52 S. W., 349.
Saulet vs. Shepard, 4 Wall, 502.
City of New Orleans vs. Norris, 3 Ward, 118.
1st Amer. and Eng. Encyc. of Law, N. S. 469.
Sage vs. New York, 47 N. E., 1096.
Briggs vs. Pfeil, Vol. 25; 25 P. L. J., 18.

Riparian rights, as indicated by the name, follow the shore, and not the land above the shore, and where the City owns the bank of the river, it is the riparian owner and not the owner of the land above the high-water mark.

Gould on Waters, 3rd Ed. sec. 156 and citations.
New Orleans vs. United States, 10 Pet. 716.

(b) *The right to wharf out, where it exists, does not confer the right to the exclusive possession.*

Should we concede all that the plaintiff in error contends; namely, that it, being the owner of the upland, (which it argues, but does not prove,) has an easement upon the land sued for, while the State possesses the legal title, this would constitute no good defense to the City's action of ejectment, since the easement would not confer upon the owner thereof the right to the exclusive possession of the land. In short, the right of wharfage, when it exists, does not include the right to exclude the State, and its other citizens therefrom. This is true after the wharf has been built, and is perhaps even more apparent before the structure has been erected. This is, indeed, expressly declared by section 25 of the Declaration of Rights, in the Constitution of Alabama, in the following language: "That all navigable waters shall remain forever public highways, free to the citizens of the State and of the United States without tax, impost, or toll, and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same is expressly authorized by law."

(c) ***But no right to wharf or of accretions is shown, even assuming the ownership of the upland to be in complainants.***

It was not shown, and there was no offer to show, when, if at all, any wharves were erected, whether before or after the date when the shore and soil upon which they were erected, was granted by the State of Alabama to the City of Mobile in trust, or the date when the grant was made absolute by the act of December 5, 1896. That the express grant of the lands to the city, and the suit for the possession thereof, by the city, or indeed, either of these, did revoke any license which was at that time revocable, cannot be doubted.

Shively vs. Bowlby, 152 U. S., 1, and other authorities hereinafter cited.

The learned judge of the United States Court for the Southern District of Alabama, discussing another case where wharves had been built after the grant to the city, has replied to this suggestion as follows: "To the contention of the defendant that if any such license ever existed, it was revoked by the act of the legislature of January 31, 1867, it may be answered that the wharves and other structures referred to were constructed *subsequent* to the passage of the act, and hence the act could not have had the effect claimed for it; and further that the Supreme Court of Alabama has said that the direct effect and object of that act was to transfer the right and power of the State in and over the shore of the river and soil under it in front of Mobile, to the city, to be exercised by it as a State should exercise it for the general good in preserving the navigability of the river being impaired and in restraining purprestures along the river front below the high-water line, by prescribing the manner in which the structures should be built into or over the water."

The fact that the legislature intended by this act to invest the title in the city in trust for the public use, does not confer upon the court the power to control the exercise of this trust or to determine whether the public good requires a wharf at one place or no wharf at another, and the learned judge wholly

ignores the second act of December 5, 1896, which vested the absolute and unqualified title in the city. (See record page 48.)

The point made by Judge Toulmin that the exercise of a license was *subsequent* to the act revoking the license, and that, therefore, the act could not have had the effect of destroying the right, this writer is wholly unable to understand. He had seen it stated that it was necessary to the power to revoke an invitation or license, that the revocation should *precede* the acceptance or exercise thereof. Are we now to learn that the fact that the acceptance of a voluntary offer is *subsequent* to its withdrawal, renders the withdrawal nugatory? What then, is the result?

To say that a revocation is inoperative, because the acceptance or revocation is subsequent thereto, is to deny that the offer is revocable at all. To say that a voluntary offer is irrevocable to the injury of a party who has acted upon the faith thereof, is supported by reason and justice. To say that a license is revocable only *subsequent* to its exercise, would be no less ruinous than illogical. It would be wholly unjust. The statute granting the lands to the city shows upon its face a revocation by the state of any license which it, the state, might have extended to the plaintiff in error and others, to wharf out into the Mobile river.

Although the question has been constantly before the courts of England and of the United States, there does not exist, so far as we are aware, a single instance in which it has ever been held that an abutting proprietor upon tidal waters has, as against the state or its grantees, and independent of statute, a right of wharfage which cannot be revoked by the state at any time before its exercise, and we shall also attempt to demonstrate that the right of accretions rests upon the same principles.

After the exercise of a license by the State, the matter must be determined upon the principles of estoppel to be hereinafter discussed.

There are many authorities—notably, the case of Webb vs. Demopolis, 95 Ala., and Compton vs. Hawkins, 90 Ala., 414, where it has been decided that upon navigable waters which are above the ebb and flow of the tide, the owner of the upland possesses the right of wharfage.

There are also almost innumerable cases asserting in general terms, that accretions belong to the owner of the upland; but in none of these cases did the question arise between the owner of the upland or the state or its grantees, who had asserted the right thereto prior to the formation thereof.

It is easy, of course, to fall into the error of supposing that these two lines of cases are, to some extent, in point of our present discussion, more especially as they have been often indiscriminately cited. But even an imperfect analysis will suffice to demonstrate that they are not so. We have hereinafter undertaken to show that where the tide ebbs and flows the title of the upland extends only to the high water mark; while, upon stream above the ebb and flow of the tide, the rules vary in the different states, in many of which—and in Alabama amongst them—the title to the upland extends to the low water mark Where the title of the upland owner extends to the middle of the stream, or to the low water mark, or to the point of practical navigability he, like the owner of any other land, possesses the right to erect a wharf or anything else thereon, subject, of course, to the right of the state to regulate and protect navigation, and such is the reasoning and the result of the authorities to which we have referred. Where, however, his title stops at high water mark—as it does in Alabama, and in all the other states upon tidal waters—the reason of these cases fails, since the land to be occupied belongs, not to him, but to the state; so that if he wharfs thereupon, it must be by grant or license from the state or from whomsoever may own this soil at that date; and not against their will.

In the case of Revell vs. Pepper, 43 *L. R. A.* 795, *the Supreme Court of Illinois, in an able and exhaustive opinion covering the case at*

bar, said: "It is, however, suggested in the argument that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state, navigable in fact, but not navigable at law, has held that the shore owner may 'wharf out' from the shore into the stream, and that the same doctrine should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they are all predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water, he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with Middleton vs. Pritchard, 4 Ill. 510, 38 Amer. Dec. 112, it was held in Ensminger vs. People, 47, Ill. 384, 95 Amer. Dec., 495, that a riparian owner in the Ohio river, having the title to the land between high and low-water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land, and make reasonable charges for its use by those navigating the river. The right however, as is apparent from the rule established in that case, rests upon the ownership of the underlying soil."

We shall, therefore, make no further reference to those cases holding that the abutting owner on non-tidal streams may use their own land for the construction of wharves, since these cases throw no light, whatever, upon the inquiry as to the right of the upland owner where the tide ebbs and flows, who owns only to high water mark, and where the State owns the soil below.

There are also many cases asserting that the upland owner is entitled to accretions. Since this doctrine applies only to gradual accretions, and since none such are shown or in fact could possibly constitute a part of the land sued for which is bounded by the *present high-water mark*, it may be unnecessary to refer to this subject, except that we shall contend that the State may cut off all riparian rights, which have not already been exercised.

There are a number of cases holding that the upland owner is entitled to accretions to his land. These cases are of two

classes, which, to be sure, include the great bulk of the occasions upon which the questions of accretions have come before the court:

First, when the title to the upland and to the shore has never been separated, so that the Government which conveys the upland possesses, and may, therefore, convey, the riparian rights, and evidences its intention to do so.

Second, where the question has arisen between individuals, the State which owns the title to the soil, acquiescing, or in other words, licensing, the enjoyment of the accretions by the owner of the abutting property. These authorities have, however, no bearing where, as in the case at bar, the United States has parted with the title to the shore and therefore with all riparian rights thereover, before the issuance of the patent under which the uplands are claimed, and where the right of wharfage and of accretions being vested in the State, are denied by the State to the abutting owner or the license is revoked before its exercise, either expressly by statute or by conveyance of the shore to a city or to some other persons.

If the plaintiff in error in this case possesses any right to wharf out over the shore of the Mobile river, or to accretions formed thereon, since something cannot come from nothing, it is manifest that they must have been acquired from some government or person who possessed those rights, and who intended to pass them, unless the upland and the riparian rights are in law inseparable, which is not the case, as will appear by a great abundance of authority hereinabove already cited. That when the State of Alabama became a member of the Union, the title to the shore and bed of the Mobile river became its property, and that the question as to whom the right of accretions and of wharfage thereover should be permitted, became a question of the State policy, is settled beyond discussion.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.

Shively vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs, 168 U. S., 357.
St. Louis vs. Rutz, 158 U. S., 250.
Barney vs. Keokuk, 94 U. S., 324.

There are only three methods known to the profession by which a State or an individual could confer upon the owner of the upland the right of wharfage or to accretions; first, by grant; second, by license; third, by estoppel. No grant is alleged or pretended. All licenses which are not based upon a valuable consideration, and, therefore, supported by a contract, are revocable, until exercised. If, therefore, our reasoning be sound, we should expect to find the following propositions supported by authority, from which it will necessarily result that the plaintiff in error, having no right of wharfage or to accretions, by grant, and not having shown the erection of any wharf or the formation of any accretions prior to the revocation of any license that may have existed, by a grant of the property to the city, can obtain no right thereto against the grantees of the State; viz:

First.—That when the shore passed to the state, it became its province to award or withhold the right of wharfage or accretions, and any such right must have been obtained from it by grant or by license.

Second.—That no common law right of wharfage ever existed, and that all such must originate from a grant or license from the state.

Third.—That it is competent for the state to sever the riparian rights, including both wharfage and the right to accretions, wholly from the upland, and to convey the same to any stranger to the owner of the upland.

Fourth.—That any license, whether granted expressly by statute or impliedly by usage, is at all times revocable by the state before its exercise, that is, before the wharf is built or the accretions formed.

Of the first and third of these propositions, we have already treated.

If we shall establish these second and fourth propositions, it

must, of course, follow: 1st. That the plaintiff in error not having shown any grant to themselves or to their predecessors, prior to the date when the shore passed to the state; and it having been shown that the state had granted to the city the absolute title to the shore before the exercise of any right of wharfage or the accrual of any accretions, the action cannot be defeated upon any idea of protecting a right of accretions to accrue in the future, or to wharves which have been built since such revocation or which are to be built in the future.

2nd. *That there was no common law right of wharfage and no license has ever been granted by Alabama to abutting owners to wharf out into tidal waters, and if it had, it would have been revocable and revoked.*

A great deal has been said in the arguments of this and similar cases as to the effect of certain statutes and ordinances establishing a harbor line in Mobile, and these have been urged as creating a license. We shall attempt to satisfy the court both by reason and upon authority, that such was not their purpose or intent. What we are about to say as to the revocability of a license resulting from usage or the common law, however, will be directly applicable to any license that could be implied from these statutes to be hereinafter discussed.

Since the learned judge of the United States District Court for the Southern District of Alabama has recently rendered an opinion in a case somewhat similar to that at bar, Sullivan Timber Company vs. City of Mobile, Fed. Rep., in manuscript, in which he has declared that the right of wharfage and of accretions upon the tidal waters in Alabama have been permitted to the owners of the upland by an immemorial usage of the state, it is interesting to observe that, had this opinion asserted that, any privileges created by this supposed usage were irrevocable by the state, at any time before its exercise either by the formation of the accretions or by the building of the wharves, it would have been diametrically opposed to the decisions of the Supreme Court of the United States and to those of the Supreme

Court of Alabama, but that, on the contrary, the learned judge in rendering that opinion, expressly declares: "This license did not vest any right until exercised, and could only be exercised by one possessing riparian rights, but when executed it was a lawful exercise of a privilege or license which became irrevocable, and especially where expenditures were made in reliance upon the license, as is alleged in the bill." Vol. 18, Am. and Eng. Encyc. of Law (2d. Ed.) 1145, Rhodes vs. Otis, 33 Ala., 578. Shively vs. Bowlby, *supra*.

While the question as to whether an invitation or license to wharf out, impliedly extended by long usage, is revocable before its acceptance or exercise, has never been directly presented to the Supreme Court of Alabama, further than in the case at bar, the question is not to be differentiated from the question as to whether any other offer, or license, or option, for which no valuable consideration has been given, may be withdrawn or revoked at any time before its acceptance.

Brost vs. Simpson, 90 Ala., 376.
Wilks vs. Ga. Rwy. Co., 79 Ala., 180.

It is at last all based upon the simple principles of contracts and of estoppels.

That at common law there existed in the abutting owner no right of wharfage upon tidal streams, and that whatever right of wharfage or of accretions he may have, must necessarily be derived from the State, either by grant or by license, is admitted by all. The learned district judge of the United States Court, in the case of the Sullivan Timber Co. vs. City of Mobile, admitting that no grant of such right has ever been made by the State of Alabama and that not even a license has ever been extended by the statutes of our State or recognized by the decisions of our courts, assumes to establish a policy for the State, based upon what he has been pleased to assert has been an immemorial custom to permit the building of wharves. From what source the existence of such a custom before his personal recollection has been ascertained, the learned judge has not stated.

In many of the states a license to wharf upon tidal streams has been extended by statute. In some of the states it has been extended by usage, but is manifestly not within the province of the federal courts to declare or to fix the policy of the states, certainly not a policy which is based upon an implied intent which is contrary to the constitutional provisions of that state (see section 25 of the Declaration Rights), and contrary to the decisions of the court of last resort in that state. Nor can a usage by a state establish a public policy until that usuage is recognized by authoritative action of its own officers. Until then the failure to assert a right might operate as laches in the particular case to whatever extent that doctrine may prevail against a government. It cannot, however, establish a policy to control other cases. This identical question as to the right of the abutting owner to wharf out in front of the land came directly before the Supreme Court of Alabama for the first time in the case at bar.

We do not think that any immemorial custom ever existed in Alabama to construct these wharves. On the contrary, the wharves that have been constructed upon the tidal streams in Alabama have been mainly constructed by persons claiming the title to the shore and the soil under Spanish grants or patents from the United States Government before the conveyance of the shore to the state, under which grants the title to the soil under the river and shore passed to the parties constructing the wharves. The facts, as we understand them to be, are that persons not holding or claiming such titles have never erected such wharves to any considerable extent. We shall, however, proceed to discuss the question as if by the custom of the past the State had tacitly acquiesced in the construction of wharves by abutting owners until it transfered the title to the city.

We might well understand how it might be a wise policy of the State to permit all abutting owners to wharf out in front of their lands, and how the State might continue for a great num-

ber of years to extend such license, and yet how the time might come when the wharves were demanded by commerce, and when the State would wait no longer upon the owners of the upland. Does the permission to wharf implied from acquiescence in the exercise thereof by others include the right to continue to hold the shore—which is the property of the State—without wharfing, and thus to defeat the object and consideration for which the license has been extended? Does the fact that the owner of a shore, whether it be the State or an individual, had for years acquiesced in the construction of wharves by abutting owners, confer any right upon those who have not availed themselves of the license? If it has been the policy of Alabama to permit the erection of wharves, what consideration has formed the basis of this policy, if it was not to induce the construction of these great aids, or we should say, essentials, to commerce? If the license be irrevocable even before exercise, the object of the policy is defeated since the abutting owner may refuse to wharf, and yet the State can not utilize its own property for this purpose. Let us illustrate; My lot is below the level of the street; the street is above the grade which is desirable to the city; therefore, the city says to me, "Remove the dirt from the street and fill in your lot." The offer stands open for years and it is made to all of the lot-holders on the street. Many of them remove the dirt, and doubtless the license is thereafter irrevocable as to them. I pay no attention to the matter until the time arrives when it is absolutely necessary for the public good that the streets should be lowered. Will any one deny that the city may withdraw the license, and authorize some other person to remove the dirt?

The doctrine of prescription can confer a right only upon those who have used that which they claim thereunder. The case of Shively vs. Bowlby, 152 U. S. 1, same case in State Court, 30 Pa. Rep. 157, would seem to be upon all-fours with the case at bar in this respect, except that the State of Oregon had granted such a license by statute while Alabama has not.

This case, which is perhaps the best adjudicated case to be found upon the subject, settles conclusively that there never has been such a thing as a right of wharfage as an incident to the title to the upland, except where the wharf is constructed under a license from the state, which license may be created either by statute or by usage; that a license from the state to the upland owner to erect wharves in front of his lands, whether established by statute or by usage, is revocable by the state at any time before its exercise; that it is competent for the state "to sell and convey away the shore, free of any right of the proprietor of the upland," and that a grant by the state of the shore, to any third person will operate as a revocation of a license to build wharves. This case is so thoroughly considered and contains such a thorough review of all of the authorities upon the subject, that it seems almost unnecessary to go further, It is to be observed, also, that the case of Dutton vs. Strong, 1 Black, 23; the Railroad Company vs. Schurmuir, 7 Wallace, 272; and Yates vs. Milwaukee, 10 Wallace, 497, all of which have been cited as authority for the proposition that an upland owner has a right to wharf upon a tidal stream, were fully reviewed by the Supreme Court in the later case of Shively vs. Bowlby, 152 U. S., 1, and held not to be authorities for this proposition.

The case of Morris vs. United States, 174 U. S., 196, while hard to read, is an undoubted authority for the proposition that the entire bed and shore of the Potomac River, having been vested in the state, a conveyance of the shore and bed of the stream by the state to the federal government conferred upon the federal government the right of accretions and of wharfage as against the owner of the upland; or, in other words, that a grant from a state to the United States government, precisely similar to the grant from the State of Alabama to the City of Mobile, in this case, cuts off the right of wharfage, and confers it upon the grantee of the state.

The case of St. Anthony Falls Water Co., vs. St. Paul

Water Comrs., 168 U. S., 349, the Supreme Court of the United States, following the case of Rundle vs. Delaware and Rariton Canal Co., 16 Howard, 80, expressly held that any license by the state to the upland owner, conferring upon him any riparian right, was at all times revocable by the state.

In the case of Hoboken vs. Penn. R. R. Co., 124 U. S., 690, the Supreme Court of the United States quoted with approval from the case of Stevens vs. Patterson and Newark R. R. Co., 5 Vroom (34 N. J. L.) 532, the following language: "That all navigable waters within the territorial limits of the state and the soil under such waters belonging, in actual propriety, to the public, that the riparian owners at common law has no peculiar rights in this public domain as incident to his estate, and that the privelege he possesses by the local custom or by force of the wharf act to acquire such rights can, before possession is taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark." Proceeding, the Supreme Court said: "It was, therefore, held in that case that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide water below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss."

In the case of Weber vs. Harbor Commissioners, 18 Wallace, 67, the Supreme Court of the United States said: "There is, therefore, no just foundation for the claim by the complainant as a riparian proprietor, of a right to wharf out into the bay in front of his land. He holds, as his predecessor took the land, free from any such appendant right. The erection of his wharf, the obstruction to the use of which is the cause of the present suit, was, therefore, not only an interference with the rightful

control of the state over the space occupied by it, but an encroachment upon the soil of the state, which it could remove with pleasure."

A better considered opinion is not often found upon any subject than that of Stevens vs. Patterson and Newark R. R. Co., 5 Vroom (34 N. J. L.) 537, in which the learned judge, after reviewing all of the authorities, and fully establishing that at common law the upland owner possessed no right of wharfage, whatsoever, and after referring to the long usage or custom which had prevailed in New Jersey to permit the upland owner to build out wharves, proceeded to say on page 545: "The local custom was nothing more than a license on the part of the public to the land owner, enabling the latter to fill in or wharf out along the fore shore between high and low water marks, and which licenses, when executed, become irrevocable. The shore owner acquired his indefeasible right by the acquiescence of the public in the performance of the act." That this was the view of the judges whose opinions prevailed in the decision of Gough vs. Bell is, I think, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief Justice Green. In that opinion, this clear statement with respect to the necessity of the execution of the license, as a prerequisite to the acquisition of a legal right on the part of the land owner, is to be found, viz: "In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line. That every encroachment upon the shore or other part of the public domain may, at all time, be restricted or controlled by the legislature, is admitted!" This doctrine that the local custom amounts to nothing more than a license which is revocable at any time before its exercise, was fully reviewed in the case of Shively vs. Bowlby, 162 U. S. 1, and was there reaffirmed.

The case of Alexander H. Bevill vs. People of the State of Illinois, 177, Ill. 468; s. c. 43 Lawyers' Reports Annotated, 790, the Supreme Coure of Illinois thoroughly reviewed the question of wharfage, and unanswerably establishes that no such right exists.

In the case of Briggs vs, Pfeil, reported in the 25 Pittsburg Legal Journal, page 18, it was expressly decided that when the State, by statute, established the high water mark, and conveyed the shore and the soil under the river below the high water mark to the city the high water line as then established became the boundary line of the owner of the upland, and he took no right to accretions, because the right of accretions must be derived from the State, who owns the soil under which they are formed, and not as against the State without its consent.

The question which we are now discussing was fully reviewed in the case of Eisenbach vs. Hatfield, 26 Pa. Rep. 539, in an opinion which is well worth consideration in any court which is interested in the question, and in which the law is declared that the riparian proprietor's right to accretions not yet in existence, or to build wharves not yet constructed, are at all times revocable by the state; or, in other words, have no existence as against the State, but exist only in the form of a revocable license from the State.

The court in this case, after exhaustively reviewing the authorities, concludes thus, viz: "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as incidental to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good."

The whole question, including the right of the city to accretions, seems to have been decided as we contend, in the case of Sage vs. Mayor of the City of New York, 47 N. E., 1103.

We contend that the riparian rights must be derived from some one who owns them; they do not descend from the clouds upon the owner of an adjoining shore, but pass from the grantor whenever and only where the grantor owns them, and evidences his intention to convey them; where the United States Government of the State, or any other person, owns both the adjoining land and the riparian rights, they or it may convey the first to one person and the second to another, and thereafter the two became separate properties, and neither passes as an incident to the other.

City of Mobile vs. Eslaaa, 9 Port. 578; s. c. 16 Pet. 251.
Hoboken vs. Pa. R. R. Co., 124 U. S., 690.
Hagan vs. Campbell, 8 Port, 12.
Shively vs. Bowlby, 152 U. S. 28 and 35.
Goodtitle vs. Kibbe, 9 How. 474.
Howard vs. Ingersoll, 17 Ala. 792.
State vs. City of New Jersey, 25 N. J. L. 525.
Stevens vs. Patterson & N. R. R., 34 N. J. L. 546.
Hardin vs. Jordan, 140 U. S. 381.
Blanchwood vs. Porter, 11 Ohio, 138.
Kaukauna W. P. Co. vs. Green Bay Canal Co., 142 U. S. 254.
Musser vs. Hershey, 47 Iowa, 361.
Simmons vs. French, 25 Conn. 346.

The state may grant to any individual the right to so wharf out upon the shores in front of another's land without compensation to the latter. This is no violation of the riparian owner's rights.

(Mississippi.)—Martin vs. O'Brien, 34 Miss. 22.
(West Virginia)—Ravenswood vs. Fleming, 22 W. Va. 52.
(Washington.)—Eisenbach vs. Hatfield, 2 Wash. 236.
" Harbor Line Comrs. vs. State, 2 Wash. 531.

This must not, of course, be confused with the idea that the wharf after it has been constructed under an *existing* license, can be taken without compensation, for which we do not contend.

The right to wharf out rests upon passive or implied license merely. The State may regulate it, or even prohibit it.

(Wisconsin.)—Cohn vs. Wausaw Boom Co., 47 Wis. 302.
" Diedrich vs. R. R. Co., 42 Wis. 262.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash. 236.
" Harbor Line Comrs. vs. State, 2 Wash. 531.

(Connecticut.)—State vs. Sargent, 45 Conn., 358.

(Iowa.)—Musser vs. Hershey, 47 Iowa, 361-2.

(New Jersey.)—Stevens vs. P. R. R. Co., 5 Vroom, 532.

Stewart vs. Fitch, 2 Vroom, 18.
Keyport, &c. Co. vs. Farmer's Trans. Co., 3 C. E. Green (N. J.), 511.

The right to reclaim the shore is a mere franchise.

Lockwood vs. N. Y. & N. H. R. R. Co., 37 Conn., 388.

The right of the owner of land bounded by navigable waters is revocable by the State, who may grant the right of accretions to a third person.

State vs. City of New Jersey, 25 N. J. L., 525.
Pa. R. R vs. N. Y., &c. R. R., 25 N. J. Eq., 158.
Stevens vs. Patterson and N. R. R., 34 N. J. L., 546.
Hardin vs. Jordan, 140 U. S., 381.
Hoboken vs. Pa. R. R., 124 U. S., 565.
Shively vs. Bowlby, 152 U. S., 35.

The question as to whether an abutting owner shall be permitted any riparian rights, whatever, is a question of State policy, subject at any time, to a modification, and where such rights are recognized, they arise from a mere license, which is revocable at any time before its exercise.

Shively vs. Bowlby, 152 U. S., 35.
Stevens vs. Pat. & Newark R. R. Co., 34 N. J. L., 539.
Conn. L. vs. N. Y. & N. H. R. R., 37 Conn., 388.
Musser vs. Hershey, 47 Iowa, 361.

The case of Pollard vs. Hagan, 3 Howard, 219, was an action in ejectment for a lot which had been formed by accretions, and the charge passed upon pointed out this fact, but it was, nevertheless, held that the title was in the State, and the grantees of the United States took no title.

Hallett vs. Beebe, 13 Howard, 25.
Pollard vs. Files, 2 Howard, 607.
City of Mobile vs. Eslava, 16 Pet., 251.

Indeed, it seems to be definitely and distinctly settled that the State may deprive the adjoining owner of all riparian right not already exercised, whether accretions, wharfage, or otherwise.

Shively vs. Bowlby, 152 U. S., 1.

In Pollard vs. Greit, 8 Ala. 949 (top of page), it was held that the United States, as proprietor of adjoining soil, did not obtain accretions after having conveyed bed of stream to State. So, in

Pollard vs. Files, 3 Ala., 31.
Kennedy vs. Beebe, 8 Ala., 914.

In Gould on Waters, Sec. 157, it is said that city, being owner of quay or river bank; is entitled to accretions.

Title of State and power of disposition is supreme.

Morse vs. O'Connor, 34 Pac. 426.
Hardin vs. Jordan, 140 U. S., 381.
Manchester vs. Mass., 139 U. S., 240.
Bowlby vs. Shively, 30 Pac. 154.
Eisenbach vs. Hatfield, 26 Pac.; 539.
State vs. Board, 27 Pac., 550.
Knights vs. U. S. Land Co., 142 U. S., 183.

The riparian owner had no right to wharf out at common law.

(California)—Coburn vs. Ames, 52 Cal. 398.
Gould on Waters, 167-9.

A wharf erected on navigable tide water, while not necessarily nuisances, are purprestures, and if the title to the soil thereunder is in the State, the title to the wharf will likewise be in the State.

Coburn vs. Ames, 52 Cal. 397.
People vs. Davidson, 30 Cal. 389.
State may maintain ejectment for such wharves.
Coburn vs. Ames, 52 Cal., 398.

It has been held that it is competent to permit a corporation to construct wharves and thereby shut off the riparian owner.

Kohn vs. Wausaw Boom Co., 47 Wis 34-5.

We take it, therefore, that the following propositions are settled by the authorities above cited:

1.—That there is no common-law right of wharfage which can be obtained as a right from the United States government after it had parted with the title to the shore by the admission of the State into the Union, and that whatever right of wharfage exists must be derived from the State.

2.—That in Alabama there has never been a statute or a grant conferring the right of wharfage, and that the only case upon the subject is the case at bar holding that no such right exists.

3.—That the right of accretions, like the right of wharfage, is a right which belongs to the owner of the shore, and may by him be separated from the upland. That if, by any established custom in Alabama, the right of accretions over the shores belonging to the State or the right of wharfage thereover had been permitted to the upland owner, this would have been a mere franchise or a license which is revocable at any time before its exercise.

4.—That in this case the license, if there was any, had been revoked by the grants of the shore, and soil under the waters, to the city, before the acceptance, and before the accrual of any accretions.

In speaking of this subject, and quoting from the decision of the Supreme Court of Alabama in the case of Mayor of Mobile vs. Moog, *supra*, Judge Toulmin has, in the matter of the Sullivan Timber Company vs. City of Mobile, observed that "the purpose of the Act of January 31, 1867, was to transfer the right of power of the State in and over the shore of the river and soil under it in front of Mobile to the city, to be exercised by it as a State should exercise them for the general good in preventing the general navigability of the river being impaired, and in restraining purprestures along the river front below high water line by prescribing the manner in which the purprestures should be built into or over the water." If the learned judge intended, by what he said in this opinion, to hold that this statute did not confer upon the City of Mobile the right of posses-

sion to the shore and water bed even prior to the erection of any wharves thereon, his opinion is diametrically opposed to the opinion of the Supreme Court of our State, by which he expressly declares himself bound and announces his intention to follow, and by which, upon repeated decisions of the Supreme Court of the United States already cited, he is conclusively bound. If the grant stood wholly upon the act of January 31, 1867, and if the construction which Judge Toulmin has placed upon that act was indisputable, the inquiry would remain whether the State or the State courts, much less the federal courts, could dictate the policy to be pursued by the city in its performance of the trust, after the legislature had transferred the trust from the State to the city for the apparent reason that the city authorities are in a better position to determine what wharves should, and what wharves should not, be built, than the legislature of the State. There would be no ground upon which the courts could say that the city could not take possession of the shore, and water front, and prohibit the construction of wharves by private owners, which would not likewise deny to the State this power, which has by all the authorities and by numerous decisions of the Supreme Court of the United States, been fully accorded to the State. Not only this, but if the city, in the absence of an action on the part of the abutting owner, were helpless to take possession of the wharves and water front and construct its own wharves, or authorize third persons to do so, then the abutting owner, may (as they have attempted in this instance to do), continued to hold a large portion of the water front wholly unimproved to the detriment of commerce and the growth of the city. It is probably for this reason that the policy pursued by Alabama in transferring the possession of its water fronts to the city has addressed itself to nearly all of the states having large ports. Washington, for instance, as will appear by an examination of the case of Morris vs. United States; in St. Louis, New Orleans, as will appear from the famous Batteau cases; San Francisco,

Chicago and New York—have all been vested with the title and control of the water front

But the case does not rest upon the act of January 31, 1867, for on the fifth day of December, 1896, the legislature passed another act (which has been wholly ignored by Judge Toulmin in his opinion), in which the legislature of the State expressly declared that the title to this property should be vested absolutely and unconditionally in the city, "to be held, maintained, controlled and disposed of as to it may seem best."

We have gone to great pains to establish that any license to wharf which might have been granted by the State could have been revoked by the grant from the State to the city, and that any license by the city would have been revoked by the suit in ejectment. There never was, however, such a license granted, as we have attempted to show.

ESTOPPEL.

The plaintiff in error sought to prove by certain witnesses that they had driven certain pilings in front of these lands, but this testimony was excluded by the trial court. The plaintiff in error now contends, as we understand, that it should have been permitted to introduce this proof, upon the theory that the State of Alabama had extended to it a license to build a wharf, and that it had accepted this license, and that it became irrevocable after its acceptance and the construction of the wharf. We desire to discuss this contention; but it must at the same time be remembered that the offer of evidence in this case was not an offer to show that there was a wharf in front of the property at the time that the suit was brought, or that any wharf had been erected thereon prior to the revocation of any license that might have existed by the conveyance of the shore from the State to the City on January 31st, 1867; nor was there any evidence, whatsoever, that the State of Alabama had ever granted to it or to any other person a license to erect such wharf, nor had any such policy on the part of the State ever been recognized either by the Act of its General Assembly or by a decision of its courts.

In the case of Shively versus Bowlby, 152 United States, page one, and in the cases therein referred to, it was assumed, if not decided, that if an abutting owner should erect a wharf under a license, express or implied, from the State the State could not thereafter revoke, the license and destroy and take from the abutting owner his wharf without compensation. If this doctrine be sound, it must inevitably rest upon the principles of equitable estoppel, and these principles we shall proceed to discuss. Even if we should concede, however, that there was an equitable estoppel against the defendant in error from maintaining an action of ejectment against the plaintiff in error by reason of its having exercised a license, this could not present a federal question for the reason amongst others, that while estoppel may be introduced in the United States courts, as a defense to an action of ejectment, (Dickerson vs. Colgrove, 100 U. S., 578; Kirk vs. Hamilton, 102 U. S., 68), this is not the practice of the State courts in Alabama, but in that State an equitable estoppel cannot be availed of in an action of ejectment, but must be enforced by a bill in chancery.

Hawkins vs. Ross, 100 Ala., 463.
McLeod vs. Bishop, 110 Ala., 640.
Goodman vs. Winter, 64 Ala., 410.
Opinion of the Supreme Court in the case at bar.

The denial, therefore, of the right of the plaintiff in error to establish an equitable estoppel in an action of ejectment, was not a denial of any right, but involved a mere question of practice, which is not subject to review in this court.

But, besides this, an error, in the judgment of the Supreme Court of Alabama, as to the existence *vel non* or the application of an estoppel, would not, of course, constitute a want of due process.

But even if an estoppel existed and could be availed in an action of ejectment, as is supposed by the plaintiff in error, it would be a grave misapprehension to suppose that because the owner of the land has induced the erection of improvements thereon by a third person, or the expenditure of money in any

other way under the belief that this title was perfect or upo
any parol license, that there would arise an unconstitutiona
estoppel against suing for the land itself. We know that th
doctrine of estoppel has, on some occasions, been stated thu
broadly and indiscriminately, but not where the limitation whic
we are about to suggest has been considered and passed upo
The whole basis of the idea of estoppel rests upon commo
justice, and the doctrine is that if the owner of land wrongfull
induces third person to expend his money either in purchasin
the title or in the erection of wharves or other improvement
thereon, upon the faith of the license, he cannot recover the lan
*without returning to the person thus induced to expend his money, th
money which he has so expended or the reasonable value of the im
provement as it then exists;* for instance: "I own a tract of lan
worth $10,000, and I wrongfully induce my neighbor to believ
that it is his land, or that I will not revoke a parol licens
which is void under the statute of frauds, and he thereupo
erects a shed thereon worth $100. Perhaps I should not b
allowed to oust him from the property without offering him hi
$100 or what the improvements were worth at the time that
sought to take possession. This would be just and therefor
equitable. But could he, on the other hand, enjoin me from re
covering my land, even though I paid him the amount which h
had been thus misled into expending. This would be the doc
trine of forfeiture; not of equitable estoppel. It results, there
fore, that the remedy of the plaintiff in error, if he has built a
wharf under a license before it was revoked, is to file a bill in
chancery seeking to enjoin the action of ejectment until the
present value of its improvements has been returned to him, and
offering, on its part, to do equity by surrendering the possession
of the land and paying the proper rent therefor upon being com
pensated for his improvements at their present value. O
course, if the wharves or other improvements have been con
sumed by their use, so that they are not now worth what they
cost, the amount to be refunded would be their present value.

This would necessarily be the case, since otherwise it would result that when one man erected perishable improvements upon the property of another, he might entirely consume his improvements by their use, and thus derive the whole benefit thereof to himself, and yet demand from the owner the value of that which he had himself consumed. Let us illustrate. The plaintiff in error may have expended $50,000 in the erection of wharves upon the defendant in error's property, they may have held possession of these wharves and rented them for their own benefit until they rotted down; is there any rule which would say that the defendant in error must pay to the plaintiff in error the original cost price of the wharves which had already been consumed by their use, as the condition to taking away from the plaintiff in error the possession of its property, simply because the plaintiff in error had already been allowed to enjoy the use of the property for a number of years, and at one time during this use, had improvements thereon? The reasoning is identically the same whether the wharves have been entirely consumed by their use, or whether they have simply deteriorated on account thereof. Upon this subject, the Supreme Court of Alabama has said: "Estoppels are protective only, and are to be invoked as shields and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the person in whose favor they arise, and they should not, in any case, be made the instrument of gain or profit.

Lindsey vs. Cooper, 94 Ala., 184.
Dickerson vs. Colgrove, 100 U. S., 580.

That the limit of the estoppel is that the owner may not oust the person making the improvements without compensating him therefor, seems to be clear.

Cowan vs. Southern Rwy. Co., 118 Ala., 561.
St. Louis vs. Green, 13 Fed., 213.

Steel vs. Smelting Co., 106 U. S., 456.
Green vs. Biddle, 8 Wheaton, 1.
Leighton vs. Young, 52 Fed., 442.
Canal Bank vs. Hudson, 11 U. S., 82 and 83.

In order to uphold the position that if the owner of land wrongfully induces another, by his failure to assert his title, to expend any sum whatever, in improving the land, though it be $10, the owner of land loses his entire title, and the investor of the $10 acquires the entire estate, although the property be worth a million, Judge Toulmin in the opinion already referred to refers to the case of the New Orleans and South Railroad Company vs. Jones, 68 Ala., 49; and the South and North Railroad Company vs. The Alabama Great Southern Railway Company, 102 Ala, 236. We find no difficulty, whatever, in reconciling these cases with our insistance that the estoppel runs so far only as to impose upon the owner of the land the necessity of compensating for the expenditure, before taking possession. It must be remembered, of course, that the railroad company who appropriated the land in question in these cases had the absolute right to do so by an ad quod dandum proceedings upon a payment of the value thereof to the owners. All that the owner, therefore, was entitled to was compensation for his land, and not to the land itself, and that the owner of the land was not estopped from proceedings against the railroad company for the value of the land, is thoroughly settled in the case of Cowan vs. Southern Ry. Co, 118 Ala., 561.

It follows, therefore, that where the party taking possession has the right to the land upon the payment of compensation therefor, he must compensate the owner even though he has been permitted to place his improvements thereon upon the faith of his ownership; and where he has no right to subject the land upon the payment of the value thereof; he must surrender the possession thereof upon being compensated for the money which he has been wrongfully induced to spend.

We take it, therefore, that even if the mere exercise of a license by the building of improvements upon land constitutes an equitable ground for enjoining an action of ejectment, or a writ of restitution thereunder, until the owner of the land has compensated the licensee for monies expended on the faith of the

license, or rather for the then value of the improvements put by the licensee it does not transfer the legal title, or constitute any just defense to the action of ejectment, irrespective of the proportion which exists between the value of the land and the amount of the improvements, and it is due to the inflexibility of the common law remedy which renders it unable to mold the remedy according to the circumstances, which has led the Supreme Court of Alabama and the majority of the other courts to hold that an estoppel must be taken advantage of by bill in equity, and not as a defense to an action of ejectment. It is, also, in this particular worthy of note, that a number of the states have enacted statutes providing for compensation for improvements under actions of ejectment, which statutes grow out of the considerations which we have just discussed.

We are aware of the authorities holding that a license when acted upon cannot be revoked without a return of the money expended on account thereof and we have discussed their scope; but the whole doctrine is, we think, untenable.

Speaking of this line of cases, it is said in Brown on Statutes of Frauds, Section 31, that, "In some of the earlier decisions, both English and American, the licensee was protected against revocations on the ground that the licensor was estopped to revoke a license on the faith of which the licensee had incurred expenses, but it is now well settled that the doctrine does not apply inasmuch as a licensee is bound to know that his license is revocable and that in incurring expenses, he acted at his own risk and peril. Courts of equity have also repeatedly declined to interfere on this ground."

In Jones on Easements, Section 6, it is said: "Although there are numerous decisions which hold that in equity a parol license becomes irrevocable, after the licensee has expended on the faith of it, these decisions are opposed to sound law, and to the weight of authority both in America and in England."

Speaking further on this subject, and quoting from a recent

decision, the author says: "The fact is that the statute that renders legal the revocation of certain classes of contracts, is founded on the theory that while by its force great loss will many times fall upon promisees, nevertheless such loss must be endured by such sufferers in order that the mass of the community shall be protected against worse disasters." In the foot note of this text will be found collated a number of authorities in each of the following states, that uphold our position: Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Rhode Island and Wisconsin.

The best collation of cases which we have found is in the note to Lawrence vs. Springer, 49, N. J. Eq., 289; s. c. 31 Amer. St., 715, where the author observed that while there are two lines of authorities upon the subject, "The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor while it justifies anything done by the licensee before the revocation, is revocable at the option of the licensor, and that although the intention was to confer a continuous right, and money had been expended by the licensee upon the faith of the license * * * such license could not be changed into an equitable right on the ground of an equitable estoppel.

The justice of these cases results from the fact that a licensee takes the license with the knowledge that it is revocable at any time. The fullest discussion of this matter, upon either side, which has come to our observation, is the case of the Great Wall Water Company vs. The Great Southern Railway Company, 54 Pacific Rep., 965, where the authorities upon the subject, both English and American, are fully reviewed, and where it is said that the great weight of authority is in favor of the absolute and unqualified power of the licensor to revoke the license irrespective of the amount of the expenditure by the licensee, and that the result in law and equity is the same. Of this matter,

the court, in the case last cited, 54 Pa. Rep., 967, quoting from the case of Crosdale vs. Lanigan, 129 N. Y., 604, same case, 29 N. E., 824, said: "It is quite immaterial in result that this interest claimed, if it existed, is equitable and not legal. An incumbrance has been erected upon defendant's lot, and his ownership to the extent of such interest has been divested. We are of the opinion that this judgment is opposed to the rule of the law established in the State. There has been much contrariety of decision in the courts of various states, and jurisdiction. But the courts of this State have upheld with great steadiness the general rule that a parol license to do an act on the lands of the licensor, while it justifies anything done by the licensor before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license.

"This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles which are most important to be preserved against defects and provocations not founded upon solid instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood and is indisputable, but to change what commenced in a license into an irrevocable right, on the ground of estoppel is another and quite a different matter. It is far better, we think, that the law requiring interest in land to be evidenced by deed, should be observed, than to leave it to the chancellor to construe an executed license as a grant depending upon what in his view may be equity in a special case."

In the case of Cronkhite vs. Cronkhite, 94 N. Y. (Sickles), 323, which was a bill in equity, it was held that the use having begun in the parol license was revocable, and that the fact that the consideration had been paid for the permission did not make

it irrevocable, and that the licensor was not prevented from asserting his right to revoke by equitable estoppel. In the note to this case, as reported in the New York Court of Appeals Reports, 19, page 699, a large number of authorities are there cited.

In the case of Pitzman vs. Boyce, 111 Missouri, 387, s. c., 19 S. W. Rep., 1104, which was a bill in equity, the court, quoting from Bigelow on Estoppel, (6 ed.) Secs. 666-7, said. "Some of the courts indeed deny the right of the parol licensor even to revoke the license after outlay under it; resting the case on the ground of estoppel in pais, or treating the situation as equivalent to part performance by parol agreement for the sale of an interest in real estate. But the better view in presence of the Statute of Frauds, appears to be that so far as the question of further enjoyment is concerned, the license may be revoked though no action can be maintained against the licensee, for what he has been induced or led to do."

After quoting from the case of the National Stock Yards against Wiggins Ferry Company, 112 Ill., 384, it is said: "To say that the license is irrevocable, because the thing permitted to be done, necessarily involved an expenditure of money would be going beyond the most extreme views of the subject, and make most licenses irrevocable. The practical fact of such a doctrine would be to make most licenses convevances of an interest in land by mere estoppel in pais." The case thus quoted holds explicitly that the expenditures of money does not constitute an estoppel in equity.

In the case of Lawrence vs. Springer, 24 Atlantic, 936, the court of errors and appeals of New Jersey said: "A copious collection of such authorities will be found in the 13th Amer. and Eng. Encyc. of Law, title 'License', p. 550, and in the text of that work it is declared that in most of the states it has been held that even where money has been expended by the licensee on the faith of the license, the licensor may exercise his power of revocation. Indeed, Professor Pomeroy, himself, though his

work on specific performance is cited by the Vice Chancellor in support of the doctrine of irrevocability of this kind, after referring to such principle as prevailing in certain jurisdictions of this country, concludes with the decided declaration, that "The rule is undoubtedly opposed to the common law doctrine, as it prevails in English and American states."

The case of Jemieson vs. Millerman, 3 Duer, (N. Y.) 255, is of peculiar interest.

In the case of Lawrence vs. Springer, 49 N. J. Eq., 289, s. c. 31 Amer. State Repts., 711; there will be found able and exhaustive discussion on this subject, holding that there is not in the courts of chancery an equitable estoppel against such revocation. The same thing has been decided in the following cases.

7 Wait's Actions and Defenses, 206, and citations.
Minneapolis Mills Co. vs. Min. St. L. R. R. 51 Min. 304; 53 N. W., 689.
Minn. W. Ry. Co. vs. Minn. St. L. Ry. Co., 58 Minn. 129; 59 N. W., 983.
Hodgins et al. vs. Farrington, 150 Mass. 19; s. c. 22 N. E., 73
Fabian vs. Collins, 3 Mont., 215.
Hathway vs. Y. W. L. & P. Co., 15 Wash., 469.
Johnson vs. Skillman, 29 Minn. 95; s. c. 43 Am. Rps. 192; 12 N. W., 149.
Cronkhite vs. Cronkhite, 94 N. Y., 323
Beck vs. L. N. O. & T., 65 Miss., 172.
Tanner vs. Voluntine, 75 Ill., 625.
Collins Co. vs. Marcy, 25 Conn., 239.
Wood vs. Mich. R. R., 80 Mich., 334.
Bobcock vs. Utter, 32 Haw. B., 439.
Davis vs. Townsend, 14 Barb. (N. Y.), 333.
Peoples vs. Godwin, 5 N. Y., 568.
Whitaker vs. Cawthon, 3 Dey (6 N. C.) L., 389.
Greely vs. Stillson, 27 Mich., 153.
March vs. Bellew, 45 Wisc., 36.
Sovereign vs. Ortman, 47 Mich., 181.
Spalding vs. Archibald, 52 Mich., 365.
R. & D. R. R. vs. D. & N. R. R., 104 N. C., 658.
Benedict vs. Benedict, 5 Day (Conn.), 468.
Houghtaling vs. Houghtaling, 5 Barb., 383.
Cook vs. Stearns, 11 Mass., 533.

Stevens vs. Stevens, 11 Met. (Mass.), 251.
Miller vs. Auburn & S. R. Co., 6 Hill (N. Y.), 61.
Hayo vs. Richardson, 1 Gill & J. (Md.), 366.
Wright vs. Freeman, 5 Harr. & J. (Md.), 467.
Clute vs. Carr, 2 Wisc., 531.
Fryer vs. Warne, 29 Wisc., 511.
Moulton vs. Fought, 41 Me., 297.
Pitman vs. Poor, 38 Me., 237.
Houston vs. Saffer, 46 N. H., 505.
Dodge vs. McClenstock, 47 N. H., 383.
Jameson vs. Milleman, 3 Duer (N. Y.), 255.
Wingard vs. Tuft, 24 Ga., 179.
Land vs. Miller, 27 Ind., 534.
Cook vs. Pridgen, 45 Ga., 331.
Williamston & T. R. R. vs. Battle, 66 N. C., 540.
Cumberland Valley R. R. vs. McLannahan, 59 P. A. St., 23.
Tufts vs. Copen, 37 W. Va, 623.
Hetfield vs. G. R. Co., 29 N. J. Law., 571.

Even if the case were such as would estop a private owner of the property from disputing the right of the plaintiff in error, it would, by no means, follow that the city would be estopped from asserting its title to public property.

City of Mobile vs. L. & N. R. R. Co., 124 Ala, 132; 26 So. Rep., 905.
Meriwether vs Garrett, 102 U. S., 511-3.
Herman on Estoppel, Sec. 1222, pp. 1365-6.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl., 682.

The distinction between private and public property is clearly set forth in the opinion of the Supreme Court of the State in the case at bar. It has already been decided in the case of the City of Mobile vs. L. & N. Railroad Company, 124 Ala, 132; 26 So. Rep, 905, that the City of Mobile could not under its charter divest itself of its title to the property by a direct grant or license, and that which it cannot directly, it cannot, of course, do indirectly.

Indeed, it is said in Webb vs. Demopolis, 95 Ala., 135, that it is doubtful whether a municipal corporation can ever be estopped by any act, whatever, as to its public property, and we think it is now well settled that it cannot.

Jackson Co. vs. Derrick, 117 Ala., 365.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl., 682.
State vs. Brewer, 64 Ala., 287.
United States vs. Kirkpatrick, 9 Wheaton, 720.
Galveston H. and S. R. R. Co. vs. State, 36 S. W., 115-6
Day Land & Cattle Co. vs. State, 4 S. W., 878.
Reed vs. Birmingham, 92 Ala., 339.
Jersey City vs. Canal Co., 1 Beasely (N. J.), 547.
Cross vs. Mayor, 18 N. J. Eq., 312.
Com. vs. McDonald, 16 George & R. 390; 13 Ill., 60.
Alleghney Co. vs. Parrish (Va.), 25 S. E., 882.
Rund vs. Fowler, 41 N. E., 456.
Freeport St. Ry. Co. vs. Freeport, 38 N. E., 137.
New York vs. N. Y. Cen. & H. Co., 23 N. Y., 562.
Wilkinson vs. Meridian, 69 Miss., 288.
Mary Lee Coal Co. vs. Winn., 97 Ala., 495.
I. C. Ry. Co. vs. Illinois, 146 U. S., 387.
Brown vs. Morris, Co. & B. Co., 27 N. J. L., 650.

THE PAYMENT OF TAXES IS NOT MATERIAL.

The 25, 26, 27, 28, 32 and 34 assignments of error complain of the refusal on the part of the Supreme Court of Alabama to reverse the judgement of the trial court on account of its refusal to admit the evidence in regard to the payment of taxes by the plaintiff in error to the City of Mobile. These assignments present no federal question whatever. If we lay aside the objection that some of the questions call upon the witness to state the effect of assessments which were in writing, and which he was not competent to construe, and the fact that the tax bills offered in evidence did not show, or tend to show, that the real estate therein referred to was the real estate which was the subject matter of the litigation, we would be confronted on the threshold of the question, with the proposition that although in the federal courts an equitable estoppel can be availed of in defense in an action of ejectment, this is a question which does not involve the rights of the parties, but the jurisdiction of the court, or the form of the remedy, and the decision of this question in this particular case was not based upon the question as to whether there was, or not, an equitable estoppel, but upon the

well-established doctrine that in the State courts the benefit of an estoppel cannot be obtained in a court of law in an action of ejectment. Even if the plaintiff in error had the right of estoppel which it asserts it has not been deprived of its rights by the decision in this case, it is at liberty to obtain the advantage thereof by a proper bill in equity.

But the payment of taxes to the city upon the property in question would not have constituted an estoppel.

In the first place, the principle of estoppel, as we have already had occasion to point out, rests upon the fact that one party has misled the other by representations to that other; it has no application, whatever, where the information of both parties is the same. The law of taxation makes it the duty of a citizen to give in his property for assessment, and not the duty of the government to hunt it up and point it out to him; so that, if the property had been assessed for taxes, it would have been a representation by the party making the assessment, and not a representation by the government to him in regard to the question of title. Besides this, it is well known that the assessments by the city are copied from the assessment of the State and county, as a matter of law. It is asserted in one State—we believe in Iowa—that a city will be estopped from asserting its title to public property, by reason of having sold it for taxes under a private assessment. The estoppel in these cases, however, was in favor of the purchaser under a sale by the city. This is a very different question from that as to whether the city would be estopped as against the party who had paid the taxes. In one case the elements of estoppel are present, for the city sold the property under the assessment as the property of the taxpayer, in the other, they are not. However, this may be, the question seems to have been directly decided in a great many cases.

Simplot vs C. M & St. Paul Ry., 16 Fed., 365.
Herman on Estoppel and Res. Adj. (Vol. 2), Sec. 1222, p. 1365.
St. Louis vs. Gorman, 29 Mo., 593.

Walcott vs. Swampscott, 1 Allen, 101.
McFarland vs. Kerr, 10 Bosw., 249.
Rossire vs. Boston, 4 Allen, 57.
Buttrick vs. Lowell, 1 Allen, 172.
Kimball vs. Boston, 1 Allen, 417.
Reynolds vs. Newton, 14 Ohio; S. C. 433.
Meyers vs. Toledo, 9 Ohio, C. D., 676.
Ellsworth vs. Grand Rapids, 27 Mich., 250.
La Ice Man. Co. vs. City of N. O., 9 So., 21.
Jarvis vs. Lynch, 52 N. E., 657.

Neither the State nor any of its governmental subdivisions can be estopped by the laches of its officers.

United States vs. Kirkpatrick, 9 Wheaton, 735.
State vs. Brewer, 64 Ala., 287.
Jackson Co. vs. Derrick, 117 Ala., 366.

Indeed, it was said in Webb vs. Demopolis, 95 Ala., 135, that it is doubtful whether a municipal government can ever be estopped by any act, whatever, as to its public property.

Dillon on Mun. Corp. (Fourth Ed.) Vol. 2, Sec. 671, p. 801.

Indeed, it has been decided that a city cannot be estoppped by the acts of its agents.

Galveston H. & S. R. R. vs. State, 36 S. W., 115-6.
Day Land and Cattle Co. vs. State, 4 S. W., 878.

So far as the taxes assessed in favor of the State are concerned, it has frequently been held that the doctrine of estoppel does not operate against the State.

Hermann on Est. and Res. Adj. Sec. 1128 (Vol 2.)
Wallace vs. Maxwell, 10 Ired. N. C. L., 110.
Taylor vs. Crawford, 4 Haws. (N. C.), 116.
Chandler vs. Lunsford, 4 Deb. and D. (N. C. L.), 407.

The plaintiff in error has contended that certain statutes establishing a harbor commission with power to establish a harbor line for the Mobile River must be construed to defeat the right of the city to the lands in question. We shall attach, as Exhibit "A" to this brief, a copy of so much of said act as is material to this discussion.

THE HARBOR LINE STATUTE DOES NOT AFFECT THE QUESTION.

We have not been able to understand whether the contention as to the effect of the act establishing the Mobile River Commission is that it wholly divested the City of Mobile of its title to the shore and bed of the river, or that it simply authorized the Mobile River Commission to grant licenses to particular applicants, leaving the title to the balance of the shore upon which no wharves were erected, still in the City of Mobile. We think that it is clear that neither effect can be attributed to the act and that the whole scope and purpose of this act was that of a police regulation, intended to facilitate commerce by protecting navigation; that the jurisdiction of the Mobile River Commission is to prescribe the manner in which docks, wharves, etc., may be erected by those having right to control the shore; that the act makes no change in the title to the property, nor does it authorize the commission to license one individual, or corporation, to erect any structure upon the property of another individual or corporation, whether private or municipal. In short, that it confers no right of wharfage, but only regulates or restricts the exercise of that right by him in whom it is already vested, whether that be the city as the owner of the shore or the upland proprietor. There are statutes in some states which provide in terms that the upland proprietor may wharf out over the shore which is the property of the state, but these are not to be confused with that class of restrictive statutes to which the present belongs, and which only provide that it shall not be lawful for those having the right of wharfage to wharf beyond a certain point or except in a certain manner—restrictions established for the protection of navigation.

Our position in this matter is not without ample support from the authorities, as will be shortly demonstrated. The learned judge of the United States Court, in the case of Sullivan Timber Company vs. City of Mobile, declining all reference to

the many authorities construing similar acts all over the country, disposes of the matter thus: "It seems to me clear that when the State of Alabama and the City of Mobile concur in saying *to any person who proposes to build or extend a wharf or structure* into the channel of the Mobile River, that it should be unlawful for *him* to do so unless he conforms to certain rules and regulations, they virtually say to him, if he constructs his said structures in conformity to the rules and regulations, it shall be lawful for him to do so." If we concede the premises assumed, no one would perhaps question the reasoning by which the learned judge has reached the conclusion announced. The premises assumed are that by a proper construction of the acts and ordinances referred to, the State and City have made such a statement to the *abutting owners upon the Mobile River*. Whether such is the proper construction of these statutes and ordinances is the only question ever argued upon this point, and to take the only subject matter of dispute as the admitted premises upon which to base an argument, is but to beg the question. We shall attempt to show that in perhaps nearly every State and City in the United States where there is a navigable water, there prevails a similar statute; that these statutes have for their exclusive purpose the protection of navigation; that they do not confer upon any person a right of wharfage, but merely regulate the exercise of that right by whomsoever may possess or acquire it; that they do not, as Judge Toulmin assumes, say to any person, you may appropriate the right of wharfage over any portion of the shore you may select regardless of all questions of ownership in the shore or soil, but say simply that the right of wharfage shall be exercised by the owner thereof only in a particular manner.

The question presented is as to the purpose of the statute, whether to confer a new right or to restrict the use of a right already existing. The language of the statute itself seems to us to be conclusive, even if we knew nothing of its history and purpose, and even when we ignore all of the authorities upon the

subject, as was done by the district judge in Sullivan Timber Co. vs. City of Mobile.

The language of the act of the legislature is very distinctive, and is that "no one shall erect or place any bulkhead, wharf, boom, dry dock, or similar structure in any of the ways mentioned in the fourth section of this act, without first making application in writing to said commission, which application shall describe the nature and exact location of such proposed structure, giving specifications," etc. This much of the act, only when construed alone, is not wholly irreconcilable with the theory that the act intended to confer upon the commission the power of conferring a license, but it is wholly irreconcilable with the idea that the act intended itself to confer the license upon any person other than the owner, and we shall hereafter discuss the question as to whether it conferred upon the commission any power to pass upon the right of the applicant to wharf out or to confer any right that did not already exist. Let us look, however, into the history and the purpose of the act, as well as at the authorities upon the subject.

The grant of 1867 from the State to the city included not only what is at present the shore and bed of the Mobile river, but also the lands which were at that time a part thereof, and which had become dry land above the high-water mark at the time of the passage of the act incorporating the Mobile River Commission. This later act makes no reference whatever to this land or to the grant to the city. Had it been the intention of the legislature to revoke the whole grant, some reference would, of course, have been made to the grant intended to be revoked, or to the lands covered thereby, and if it had been the intention to revoke the grant as to part of the land and not to the other, some method would surely have been established by which the two parts could be separated, or identified. And yet, not the remotest reference to this land or grant can be found in the act which is said to have been intended to affect the revocation of the grant. Indeed, it will be seen that the act expressly

declares that "It shall not be construed to authorize the commisson to demand, receive or collect . .... anything from any person or corporation."

Part of the shore along the river over which jurisdiction is conferred upon this commission, is owned by the State of Alabama, part by private individuals, and part by the City of Mobile. It will be observed that identically the same power is given, in identically the same language, as to each class of property, which would certainly indicate that the intention was not that the commissioners were, by their act, to confer valuable rights in one class of property, while as to the other class, it can confer no rights whatsoever.

It is to be observed that no machinery whatever is provided for the hearing or a trial between the parties who assert conflicting claims to the property, and that no power is conferred upon the commission to decide between such claimants, which, of course, indicates that the powers of the commission were not to confer rights or to grant licenses, but that it was limited to the power to regulate the use of property by the owner, and presupposes the ownership of the property in the party who assumed to wharf. If it were the intention that this commission should pass upon the question of title, some provision would be necessary for a hearing by the parties in interest, and, under our constitution, for a trial by jury.

Brown vs. Morris Canal and Bank Co., 27 N. J. L, 650.

If it was the intention to grant a license over the city's property, was it the intention to authorize the commission to grant a license to an adjoining owner, or to any third person? It would seem to be impossible to suppose that it was the intention to confer the right to grant the license to any stranger without any provision being made for an investigation into the question of the policy of such a license, and if it was the intention to grant the right only to the abutting owner, some provision would have been necessary for the machinery to determine who the abutting owner was.

It will be observed that the same fee is charged to all who apply for the right to wharf out. It will be observed that this fee is identically the same whether the wharf is to be erected on private property acquired in the shore before Alabama became a member of the Union, or upon the city's property, and that this fee is to go, not into the city's treasury, but into the treasury of Mobile county. This would seem to indicate that it was not intended to grant a license over the city's property, but that it presupposes that the party who erected the wharves should obtain the right from whomsoever it belonged, and should pay the fee as a contribution to the expenses of maintaining the River Commission and performing its duties.

It will be observed that the act gives the commissioners no powers whatsoever to sell any property, or to obtain any consideration therefor, or to give any evidence whatever of a grant by it, which are themselves circumstances which seem to us to be entitled to considerable weight in the construction.

It will be observed also that the caption of this act reads; "An act to incorporate the Mobile River Harbor Commission, and to define its powers." If the body of the act is to be construed as undertaking to grant away the title of the City of Mobile to its public streets, highways or water front, the act is unconstitutional, because the purpose of the act is not embodied in the title.

City of Mobile vs. L. & N. R. R. Co., 124 Ala., 132, 26 So. Rep., 905.

And it will not be contended, we presume, that the courts will unnecessarily place a construction upon an act which would render it unconstitutional.

City of Mobile vs. L. & N. R. R. Co., 124 Ala., 132, 26 So. Rep., 905.

It is to be remembered, also, that a part of the property which was granted to the City of Mobile, had, prior to the creation of the Mobile River Commission, become highland, and no longer formed a part of the shore. Was it the intention to

convey away this land from the City of Mobile, and place it in the commission? Such must have been the intention, if the act confers the right upon strangers to erect wharves to the channel line over the city's property, and yet the language of the act itself prohibits such a construction, since the jurisdiction is confined to the river as it existed at the passage of the act.

The history of this act throws great light upon its proper construction.

Commonwealth vs. Alger, 7 Cush. (Mass.), 82 *et seq.*

Similar statutes have been enacted all over the country. And it has been said by the Supreme Court of the United States, in the case of Packett Co., vs. Catlettsburg, 105 U. S., 563, there is probably not a city in the United States fronting on a navigable stream where a similar regulation of navigation has not been established. This legislation began by the enactment of the city ordinance prior to the time when the City of Mobile had obtained its title to this water front. The channel line will be found marked upon the map by P. J. Gaillard of 1866.

The first ordinance will be found in the Municipal Laws of Mobile of 1858, which was simply an ordinance providing "that, no wharves nor any other structure shall be built or constructed, or extended, etc., beyond a certain designated channel line." Finding that the machinery for preventing the infringement of this rule was insufficient, an ordinance was adopted in 1852, which was to the same effect, except that it required the owner of the land to obtain a permit from the Civil Engineer of the city before their erection, very much as it is required of the owner of every city lot to obtain a permit before erecting a building thereon, and prescribed certain fire limits within which no frame building shall be erected, a class of ordinances which are very common and which are never understood as intended to confer any title or license to the land upon which the improvement is to be erected. It was in perfection of the same line of legislation that the act of the legislature, establishing the Mobile River Commission, was enacted.

We think, therefore, that if we were left upon our own resources, without the benefit of authorities upon the subject, it would not be difficult to ascertain that the only purpose and effect of the act of the legislature referred to, was the protection of the navigability of the Mobile River, and that it had no purpose whatever to change or control the title to the shore, and was a police regulation intended to, and did confer no right of property or of possession upon any person; or, in other words, that the whole purpose of the act was restrictive upon the exercise of a right already existing so as to prevent any interference with commerce. Speaking of a statute very much like the present, Mr. Justice White, in the case of Morris vs. The United States, 174 U. S., 351, said: "That the preservation of navigation was the controlling object in the regulation of private wharves is very distinctly evidenced in the act of councils, approved January 8, 1831 ..... which, in sections 6 ..... enacted as follows:

"Sec. 1.—That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation, who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee of the two boards of the City Council shall examine the same, and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall extend from the street on which they are erected."

It will be observed that this statute, which was in that case held to confer no right of property, is very similar to the statute which is the subject matter of this discussion.

Speaking of this subject in Lewis on Eminent Domain, section 84b, the author says: "The establishing of harbor lines or dock lines is simply a regulation of the private right of building piers and wharves out to navigable waters in the interest of the

public right of navigation and commerce. The establishment of such lines and the prohibiting of building piers and wharves beyond such lines is not the taking of private property."

Speaking upon the same subject in Gould on Waters, section 138, the author says: "It is competent for the state legislature to control the management and operation of wharves and piers in navigable waters, even in the hands of private persons; to establish wharves and harbor lines and to empower commissions to license structures extending to such lines. The mere establishment of the harbor or dock line does not change rights of property, nor is it an abandonment of the right of the State to control and regulate the water within the line." See authorities cited.

In the case of the Potomac Steamboat Company vs. Upper Potomac Steamboat Company, 109 U. S., 698, the court, after quoting a statute almost identical with the one which is now under discussion, proceeded to say:

"The resolutions are not, however, even a recognition of the existence of any private right of wharfing attached to the ownership of lots fronting on the north side of Water street. In point of law, they merely regulate the mode in which the right shall be exercised, whether private or public, leaving the question as to title in each case, to be judicially decided."

Speaking of a similar statute in the case of Prosser vs. Northern Pacific Railroad Company, 152 U. S., 64, the Supreme Court of the United States held that these statutes do not, in any manner, affect the title to the property or the right of wharfage, except to prescribe the manner of the exercise of the right, so as not to interfere with commerce.

In the case of Brown vs. Morris Canal Banking Company, 27 N. J. L., 648, the court construed a similar statute and pointed out that it was impossible to suppose that the legislature intended to confer upon the commissioners the power to pass upon the right of wharfage without giving them some machinery to enable them to bring the parties before it, to be

heard upon this question, not to mention the fact that the constitution guarantees a right of trial by jury upon the question of ownership.

In the case of Commonwealth vs. Alger, 7 Cush., 85, after reviewing a line of statutes similar to those which are now in question, it is held that, "The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats and vessels of all kinds, as a common and public right."

Potomac S. Co., vs. Upper S. Co., 109 U. S., 698.
Prosser vs. Northern Pa., 152 U. S., 64.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl, 682.
Atty. Genl. vs. Boston and S. R. R., 118 Mass., 345.
Commonwealth vs. Alger, 7 Cush., 82 et seq.
Leovy vs. U. S., 177 U. S., 629.
Altre vs. Packet Co., 21 Wall, 393.
Brown vs. C. & B. Co., 27 N. J. L., 650.
Baltimore vs. McKim, 3 Bland Chy. R., 470. (Md.)
Casey vs. Inloes, 1 Gill (Md.), 430.
Dugan et al. vs. City of Baltimore, 5 Gill & J., 351.

The case of Jersey City vs. Amer. Dock & Imp. Co., 23 Atl. Rep., (N. J.), 683, is upon all-fours with the case at bar, and the following quotation from the opinion of the court is certainly in point:

"As already shown, the title to these premises was vested in the municipality by the statute of the 4th of April, 1872; and it did not capacitate itself to take possession by the giving of its bond until the 4th of March, 1885. During the long period of time, extending through nearly thirteen years, the city neglected to execute the trust confided to it, and, on the contrary, permitted the defendant to acquire title to the property from the riparian commissioner; saw the defendant at large expense, fill up and improve the land, and subject it to the municipal taxes. It is this series of circumstances that is relied upon to operate as a 'substantial revocation by the State of the grant' in question.

"The fallacy of this proposition is apparent at a glance. How can it be held that the State has revoked this grant when the State has in no wise, either directly or indirectly, participated in the affair? The assumption that the board of riparian commissioners was the agent of the State, and, as such, conveyed the premises to the defendant is conspicuously unfounded. * * * The riparian commissioners, having no dominion over these premises, could no more convey them than they could transfer to the defendant the courthouse of the county. Nor would even the joint action of the board and the city give a semblance of legality to the transaction. If the municipal corporation had by the most formal of writings assented to the commissioners' grant, or had joined in it as a party, the instrument would have been an absolute nulity.

"This result proceeds from the characteristics of the property in question, and which has been heretofore fully defined. The title is vested in the city, in trust for the public, and is, therefore, inalienable and indisposable, except by legislative action.

"The composition of the so-called title of the defendant, it will be observed, consists of the acquiescence and neglect of the trustees of a public use, and a deed of a board having no powers over the subject, such a claim seems to me singularly futile."

The case of Eisenbach vs. Hatfield is a full discussion of the points involved in our case, and reviews the cases.

26 Pac. Rep., 539.

"The design of the State law (speaking of the Harbor Commission act) is to prohibit the encroachment by private individuals and corporations on navigable waters and to secure a uniform water front."

Yester vs. Washington Harbor Line Comrs., 146 U. S., 656.

The decision of People vs. Vanderbilt, in the 26 N. Y., 287, has been frequently cited in this controversy as upon all four with the case at bar. Indeed, the principle involved was identically the same, but the decision of that case, when properly

understood, is adverse to the contention of the plaintiff in error. It has never been doubted by us that the legislature of the State has the absolute power to establish a harbor line beyond which no wharf can be erected, irrespective of whether the title to the bed of the stream is in the government, or in a private owner. This power is not only conceded by us, but is thoroughly established by the decisions of the Supreme Court of the United States, and indeed all over the country. It rests upon the police power of the State for the protection of navigation and commerce, and is not the taking of private property, but the regulation of the use thereof, so as not to interfere with the use of the public highways. This and the further proposition that the establishment of such harbor line, does not in any manner, affect the title, or the use, of the property above the channel line, is all that is decided in the case just mentioned. The State of New York had granted to the City of New York the title to the shore and to the bed of the stream to a distance of six hundred feet from the high water mark. It had expressly prohibited the sale or disposition of the property to private individuals. In violation of this limitation, the City of New York undertook to transfer its right to Mr. Vanderbilt, and Mr. Vanderbilt built out from the shore beyond the harbor line as established by the river commissioners, under an act precisely similar to that with which we have to deal in the present case. According to the contention of the plaintiff in error the establishment of this harbor line took away from the City of New York its title to the shore and to the bed of the stream, both on the inside and on the outside of the harbor line. The court, however, decided to the contrary, and held that the effect of the establishment of the harbor line was simply to prevent the erection of a wharf beyond the harbor line, and further to revoke the previous act of the legislature conferring the right upon the city to wharf out as far as six hundred feet, to the extent, and only to the extent, of limiting that right to the harbor line. The language of the court was as follows: "No pecuniary interest is granted by

it to the city. It was passed exclusively for public purposes and simply substitutes the authorities of the city for the legislature in the accomplishment of certain public objects. It was subject, however, at any time and to any extent, to alteration or repeal Although the act of 1858 (which was the act establishing the river commission and harbor line) does not in terms restore the title to the land outside the pier line and within six hundred feet to the people of the State, yet such no doubt was its effect. That title having been transferred to the city for a specific public purpose, and that purpose having been abandoned, and its accomplishment rendered impossible by the act of 1857, the latter act must operate *pro tanto* as a repeal of that of 1821, and the title would, of course, revert to the people. It follows that the whole structure *outside the pier line*, it having been commenced after the passage of the act of 1857, was purpresture and liable to removal, irrespective of the question of whether it was a nuisance, or not."

Here we have an express finding that the effect of the establishment of the harbor line was to prohibit the city and its assigns from building a pier beyond the harbor line, but that it did not affect the title of the city to the property down to the harbor line.

The case of Miller against Mendenhall, 19 American State Reports, page 219, while apt to mislead, is of no great importance. The rule of construction of grants of land bordering upon navigable streams differs according to whether the tide ebbs and flows. Where the tide ebbs and flows, it is settled, both in Alabama and all over the Union, that the rights of the patentee are confined to high water mark. Where the tide does not ebb and flow, however, the rights vary in the different states. In some of the states, the abutting owner is confined to high water mark, and in others to the point of practical navigability. As is stated in Moller against Mendenhall, "The action of the State through the legislature in establishing the dock line is to be construed in connection with the established

doctrine of riparian rights of which we have spoken." The point decided in the case of Miller against Mendenhall as to the effect of the act of the legislature establishing dock lines is that it is an implied designation or location by the legislature of the point of practical navigability. It does not decide that this act takes from, or confers upon, the abutting owner any right which he did not already possess under common law, or under the other statutes of the State, but simply that it does establish the point of practical navigability, although it is declared by this decision, that under the rule established in Minnesota, the riparian owner takes to the point of practical navigability. In Alabama, however, where the tide does ebb and flow, it is distinctly decided that the abutting owner does not take below high water mark. It is conceded that the establishment of the harbor line does point out the point of practical navigability in the river, but we must look to the common law to say whether the plaintiff in error owns below high water mark and to the point of practical navigability, and as we have seen it has been distinctly settled in Alabama that they do not.

It may, however, be proper to observe that in Rhode Island upon the decisions of which state the case of Miller against Mendenhall is rested for authority, the rule in question is statutory, and the decisions as to the effect of these statutes, therefore throw no light upon the question.

IN REGARD TO THE MATTER OF ADVERSE POSSESSION.

The 10, 20, the 53, and from the 29 to the 51 assignments of error complain of the action of the Supreme Court of Alabama in declining to reverse the judgment of the trial court on account of its rulings, declining to permit the defendant below, now the plaintiff in error, to offer evidence tending to establish certain acts of ownership which were relied upon by the plaintiff in error to establish its adverse possession of the property in question.

It would seem to be a sufficient answer to the contention

based upon adverse possession, that it has been thoroughly settled in Alabama and in this very case, that adverse possession did not run against the City of Mobile in regard to its streets and water front.

In the case of Olive vs. State, 86 Ala., 94, it was held that there can be no proscriptive right to maintain or continue an obstruction to the navigation of a public stream.

The law upon this subject has become thoroughly settled in Alabama to be as stated by Judge Dillon in his work on Municipal Corporations, (4th ed.) Sec. 675, page 803, where it is said:

"Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within the limitation statutes and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto."

Webb vs. Demopolis, 95 Ala., 116.
Reed vs. State, 9 So. Rep., (Ala.) 163.
Olive vs. State, 86 Ala., 94.
Driggs vs. Phillips, 8 N. E., 514.
Burbank vs. Fay, 65 N. Y., 57.
Yates vs. Warrenton, 4 S. E., 818.
Smith vs. State, 23 N. J. L, 727.

When the municipal corporation acts as the representative of sovereignty, the statute of limitations cannot be invoked against it.

Marslis vs. Garrison, 27 S. W. (Texas Ct. App.) 932.

It remains only, therefore, to establish that the property in question is of a public and not a private nature.

The presumption is that all city property is of a public nature.

Curry vs. Savannah, 37 Amer. R., 74.
Mobile Trans. Co. vs. City of Mobile.

And that wharf property, when owned by a city, is of a public nature, seems to be clear.

Mobile Trans. Co. vs. City of Mobile.
Meriwether vs. Garrett, 102 U. S., 501.
Klein vs. N. O., 99 U. S., 150-1.
Hitchcock vs. Galveston Wharf Co., 50 Fed., 269.
Hart vs. Burnett, 15 Cal., 530.

Indeed the words of the grant itself declare that the property shall be held by the city as public property in trust for the public use, and that the intention of the act of 1867 was to create a public trust has already been decided. The statute of 1896, by which this property was converted into private property, is, of course, too recent to affect this question.

There is no federal question presented by these rulings whatever. The limitation upon the rule of action for the recovery of real estate is statutory, and the application of the statute of each state cannot be said to be anything more than the construction of the State statute as to which the decision of the State court is conclusive.

DuSaussure vs. Gaillard, 127 U. S., 216.

We have understood, however, that the gentlemen on the other side contend that before this property was conveyed by the State of Alabama to the City of Mobile in 1867, and while the title stood in the name of the State, the statute of limitations ran against the State, it being expressly provided by the statutes of that State that actions by the State for the recovery of real or personal property are barred in twenty years, and from this it is supposed that the defendant in error was at liberty to prove the continuous, open, notorious and exclusive adverse possession of this property for twenty years prior to the time the city became the owner of the property, the idea being that the ownership of the property had thus been vested in the plaintiff in error, or

their grantors, prior to the grant to the city. If his contention could prevail, it might show that the decision of the Supreme Court of Alabama was erroneous, but it would not establish a violation of any provision of the federal constitution, or otherwise present a federal question.

The contention, however, cannot prevail. There never has been in Alabama a statute of limitations which would run against the State in less than twenty years. This statute was first engrafted into our law as a part of the Code of 1852.

The enactment of this statute having been less than twenty years before the conveyance of the property from the State to the city, the contention that the adverse possession had ripened into a title prior to the conveyance to the city falls to the ground.

It is stated, however, that where the State holds the title only as trustee for certain individuals or a political subdivision of the State as distinguished from the State at large, and where the action is brought in the name of the State but is for the benefit of a *cestui que trust*, the action is really by the *cestui que trust*, and not by the State, and the statute of limitations of ten years is applicable. This was decided in the cases of

Miller vs. The State, 38 Ala., 600.
Burke vs. Mitchell, 87 Ala., 61.
Wyatt vs. Tisdale, 97 Ala., 594.

The doctrine has, however, never had any application where the title to the State was absolute or the trust was for the benefit of the whole people.

Lindsey vs. Miller, 6 Pet., 666.
Burgess vs. Gray, 16 How., 48.
Frisbie vs. Whitney, 9 Wal., 189.
Sparks vs. Pierce, 115 U. S., 408.
Jourdan vs. Barrett, 4 How., 169.
Gibson vs. Johnston, 92 U. S., 343.
1 Cen. Dig. Colm , 2042.
Wright vs. Porter, 6 Port., 84.
Jones vs. Walker, 47 Ala., 175.
Kennedy vs. Townsley, 16 Ala., 239.

Swann vs. Gaston, 89 Ala., 569.
Wagnon vs. Fairbanks, 105 Ala., 527.
Reed vs. Mayor, 92 Ala., 339.
Webb vs. Demopolis, 95 Ala., 116.
Hahn vs. Common Council of Dadeville, 100 Ala., 199.

It is, however, quite a sufficient answer to this proposition to say that the question was never raised either in the trial court or in the Supreme Court of Alabama. No one of the questions asked and objected to indicated upon its face that the defendant in error was undertaking to establish adverse possession of the property prior to the grant to the city, while the title stood in the name of the state, nor did the defendant in error see fit to state to the trial court his purpose, or to point out to the court what he expected to prove, and the proposition which is here argued was never advanced in the Supreme Court of Alabama. It may be remarked in conclusion, that all of the evidence which the defendant in error undertook to introduce upon the question of adverse possession would not have been sufficient to have authorized the submission of the question of adverse possession to the jury, even had the property been private in its nature, the parties in question individual citizens and every question asked, answered most favorably to the plaintiff in error.

Has the Title of the City Been Destroyed by Legislation?

The State of Alabama granted these lands to the City of Mobile in 1867, in trust for the public use. It is now insisted that the charter of the City of Mobile was annulled by the act of the General Assembly of Alabama, approved February 9, 1867, page 542, Pamphlet Acts of Alabama of 1896-1897, which is nothing more nor less than an amendment of the City Charter, and that the title to the lands in question, therefore reverted to the State. If the charter of the city had been annulled and vacated, and no successor had been created, such might be conceded to have been the effect. But it is unnecessary to consider what might have been the effect of that which did not

happen, since the act referred to did not change the identity of the corporation. This precise question has already been before the Supreme Court of the United States, as well as the Supreme Court of Alabama, and may be treated as settled.

Mobile vs. Watson, 116 U. S., 301.
Dillon on Mun. Corp., § 172.
Millers' Admr. vs. City of Pensacola, 2 Woods, 632.
Broughton vs. Pensacola, 93 U. S., 269.
O'Connor vs. Memphis, 2 Lea, 730.
Amy & Co. vs. Selma, 77 Ala., 124.
Mobile Trans. Co. vs. City of Mobile, in manuscript.

It is to be observed that the title to the property in question is held in the same manner as all of the public property of the City of Mobile, such as the streets, cemeteries, market houses, public squares, etc., and it would be anomalous indeed, if it should be held that by virtue of the act referret to, the title to all of this property reverted to its original owner by reason of this act in 1897, and that the present City of Mobile has no title to any of the public property so necessary to its existence. The contrary has been the universally accepted theory, and the present City of Mobile is today the possessor of all of its public property without any title, except such as it obtained as the successor of the old City of Mobile.

If the identity of the City of Mobile can be thus easily destroyed, so that it would cease to own the municipal properties, it would, of course, at the same time, cease to owe municipal debts, a consideration which well nigh induces us to wish that we were in error.

The question was not raised in the Supreme Court of Alabama, and is not federal in its nature.

The Contention That Ejectment is Not the Proper Remedy.

This contention merits but little consideration. That if the plaintiff has title it may recover, can hardly be questioned, and that ejectment is the proper possessory action for land, whether above or below the water, is, we think, not open to doubt.

Hoboken vs. Penn. Rr., 124 U. S., 658.
Barney vs. Keokuk, 94 U. S., 324.

In Mobile versus Eslava, 9 Porter, 577, the action was tresspass to try title.

Goodtitle vs. Kibbe, 1 Ala, 403, 9 How., 471.
Pollard vs. Greit, 8 Ala., 932.
Kennedy vs. Bebbe, 8 Ala., 909.
Hardin vs. Jordan, 140 U. S., 371.

And indeed a great number of the cases already cited were actions of ejectment for submerged lands, and it has never before been suggested, so far as we know, that the remedy was illy chosen.

Respectfully submitted,

HARRY T. SMITH,
GREGORY L. SMITH,
Attorneys for Defendant in Error.

EXHIBIT "A."

AN ACT

TO ESTABLISH A RIVER COMMISSION FOR MOBILE RIVER AND BRANCHES, AND TO DEFINE ITS POWERS, AS AMENDED BY AN ACT APPROVED FEBRUARY 28TH., 1889.

Section 1.—Be it enacted by the General Assembly of Alabama, That the Mayor of Mobile, the President of the Board of Revenue and Road Commissioners of Mobile County, or of any revenue board for said county, by whatsoever name it shall be known, if any, which shall hereafter by law succeed the said Board of Revenue and Road Commissioners, the President of the Mobile Chamber of Commerce, and their successors in office *virtute officii*, and a lawyer of not less than ten years standing at the bar of Mobile, to be appointed by the governor every four years, commencing January 1st, 1887, and a citizen of the county

of Mobile of not less than ten years residence therein, who shall not be a practicing attorney, to be appointed by the governor every four years, years ,beginning January 1st, 1889, be and the same are hereby constituted a body politic, under the name and style of "The Mobile River Commission," with the power and duty to provide a corporate seal for the authentification of all its official acts: *Provided*, that the lawyer appointed on said commission shall not be employed to prosecute or defend any suit brought by or against said commission.

Sec. 4.—Be it further enacted, that the jurisdiction of said commission shall extend over the Mobile and Tensas River, from a point one hundred yards above the head of Tensas River to a line in Mobile Bay, running east and west through the light-house at the mouth of Mobiie river, and over all tributaries and cuts off of said rivers as far up as tide water extends, including Spanish and Middle River, and including the water front of the City of Mobile; and within the said limits of the east bank of Tensas River, the west bank of Mobile River, and the east and west line near the mouth of Mobile river, and within the tide water of such tributaries, it shall be the duty of the said Mobile River Commission to establish from time to time as may appear to the said commission necessary for the protection of the navigability of said waters and the integrity of Mobile harbor and its improvements, bulk-head, wharf, dry-dock, and boom lines, and lines for similar structures, and it shall be unlawful for any person to build or maintain a bulk-head, wharf, boom, dry dock, or similar structures as the case may be, otherwise than in conformity with the lines so established, or in manner and form contrary to the regulations established by the said commission; and said commission is hereby authorized to have all or any portion of the waters embraced within its jurisdiction properly surveyed and sounded, and maps thereof made for filing in its office for its information, the expense of which

shall be charged to Mobile County, and paid as hereinafter provided.

Sec. 8.—Be it further enacted, that no one shall erect or place any bulk-head, wharf, boom, dry-dock, or similar structure in any of the waters mentioned in the fourth section of this act, without first making an application in writing to the said commission, which application shall describe the nature and exact location of such proposed structure giving specifications, and shall be accompanied by a diagram giving the exact plan thereof, as well as of the shore on both sides of the river or stream on which the same is located, for a distance of at least one hundred yards above and below the proposed structure, and when in municipal limits a distance back to the first street parallel to said river, which plan shall be drawn with India or other equally durable ink on durable drawing paper on a scale of fifty feet to the inch, and shall show the names of the riparian proprietors on both sides of the river opposite said structure where known: and said petition and map shall contain such other information as may be required by said commission and shall be sworn to: and said commission may examine on oath the applicant and such witnesses as may be produced before it for the purpose of establishing the line, and any willful false swearing shall be perjury. Said petitioner shall at the time of filing his application deposit with the City Clerk the sum of fifteen cents per foot for each lineal foot of the proposed boom, and twenty-five cents per foot for each lineal foot of wharf, bulk-head, dry-dock or similar structure, to be measured along the line of its longest dimensions: *Provided*, that when a bulk head and wharf line are sought to be established for the same wharf or structure, only one fee shall be charged, which shall be calculated on the line having the longest dimension. And said commission shall not entertain such petition until such fees are paid, but in case the application is declined and the structure is abandoned, one-half of said fee shall be returned to the applicant on filing with said commission written notice of such abandonment.

Sec. 9. Be it further enacted, that it shall be the duty of all persons, maintaining at the passage of this act, any wharf, boom, or dry-dock or similar structure in any of the waters mentioned in section four within ninety days after the first publication of notice of the passage of this act, and of the requirements of this section, in a newspaper published in Mobile, to file with the said commission for its approval an exact description and plan of such structure as prescribed in the foregoing section for future built structures, unless on application in writing said commission may by an order duly entered on its minutes extend such time in any particular case, and in case the owner or proper agent of such owner shall fail to comply with the requirements of this section, the said commission may have a survey and proper description and plan thereof made at the expense of such owner by a competent person, and the said commission shall bring an action in its own name in a court of competent jurisdiction to recover of such owner as a penalty, double the cost of such survey, description and plan, and the amount so sought to be recovered shall be a lien on the property of such owner from the commencement of such action, and when recovered shall be paid into the county treasury of Mobile County. And in case the owner of said property be not known or be a non-resident, then the proceeding may be *in rem* against said property in the nature of an attachment suit, and the said property be levied upon as in attachment suits, and notice thereof shall be given, and all other proceedings shall thereafter be had as is or may be provided by law for attachment suits against non-residents, but no attachment bond shall be required of said commission, and if said commission disapprove any such structure in whole or in part, the same shall be considered and held prima facie a nuisance to the extent of such disapproval, which action of the commission shall be duly entered on the minutes of said commission, and the owner or maintainer of said nuisance shall remove the same within thirty days after notice thereof or otherwise conform to the requirements of said commission, and in

default thereof shall be subject to the proceedings and pains and penalties mentioned in sections five and six of this act.

Sec. 10.—Be it further enacted, that upon the filing of any application for the privilege of erecting, altering, or maintaining any wharf, bulk-head, boom, or dry-dock, or other similar structure, as provided in previous sections of this act, it shall be the duty of the said commission to carefully examine the plan and specifications furnished them by the applicant, and they may take testimony as to any fact pertaining to said structure, or its effect upon the navigation of such stream, and shall; if not otherwise accurately informed, have a survey made by a competent engineer, of the place or portion of the river which it is proposed said structure shall occupy, and said engineer shall take sufficient soundings to show the depth of water along the line and within the inclosure of such bulk-head, wharf, or boom lines or within the area to be covered by such dock; and a permanent record shall be made thereof with the date of such measurement; and in case any such application is granted, it shall be the duty of such commission to have the said lines or area accurately defined by the city, or other competent engineer, by stakes or other signs for the guidance of said applicant, if desired by him, and at his expense, and when such structure is finished, survey thereof shall be had by the city or other engineer employed by such commission, who shall report to said commission, and if such structure conforms to the requirements of said commission, a certificate of such facts shall be furnished to said applicant, and a record thereof shall be made in the book of records of said commission. It shall be the duty of any such applicant to furnish free transportation to and from the location of any such structure, to said engineer and his necessary assistants acting in the performance of any duty required by this section, or to the commission, or any authorized committee thereof, if they desire to personally inspect such location or work. The said engineer shall receive for his services such compensation as may be agreed upon between the

said commission and himself, not to exceed ten dollars for each day, or fraction of a day, for his own services, and not exceeding two dollars and fifty cents per day for each assistant necessarily employed by him, to be paid by the county wherein said structure is located as hereinafter provided, and said commission may send the city or other engineer to inspect any locality, for the purpose of ascertaining whether any nuisance has been or is being erected or maintained in any navigable water within its jurisdiction and to make report thereof. And it shall be the duty of the city engineer, whenever the existence of any such nuisance shall become known to him to report the same of his own motion, and all nececessary expense authorized by such commission for the purpose aforesaid, shall be paid by the County of Mobile, as elsewhere provided in this act.

Sec. 15. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect thirty days after the date of its approval."

No. 274. 62
Sup. Ct. Br. of Smith & Smith
Filed April 24, 1902.

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JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1901, No. 274.

MOBILE TRANSPORTATION COMPANY,
PLAINTIFF IN ERROR,
VS.
CITY OF MOBILE,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF BY HARRY T. SMITH AND GREGORY L. SMITH, FOR THE DEFENDANT IN ERROR.

COMMERCIAL PTG. CO., MOBILE.

Supreme Court of the United-States.

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CITY OF MOBILE,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF BY HARRY T. SMITH AND GREGORY L. SMITH, FOR THE DEFENDANT IN ERROR.

Much is contained in the brief for the plaintiff in error which is calculated to mislead the court as to the history of this litigation; as to the physical conditions existing at Mobile, and as to the state of the decisions of the Supreme Court of Alabama.

It is stated on the second page of this brief, and as a part of the facts in this case, that soon after the passage of the act of January 31, 1867, by which the State of Alabama conveyed to the city of Mobile, the shore of the Mobile river, the city of Mobile undertook to interfere with the owners of *all* of the private wharves in front of the city, and that thereupon an injunction was obtained from the United States Circuit Court by which the city of Mobile was forever enjoined from ever asserting any title under this act. One would suppose from the statement not only

that this fact appeared from the record in this cause, but that the litigation and decree referred to involved the property which is now in question. The contrary is the fact. The litigation referred to by the plaintiff in error had no reference whatever to the land involved in this suit; was not pleaded as *res judicata*, and is not shown by the record in this cause. An examination of the record in the case of Leverich vs. The City of Mobile, Supreme Court of the United States, October Term, 1874, No. 2, will show that it involved an entirely different tract of land from that which is now in question. It is true that the opinion rendered by the District Judge in that case, declared every principle of law adversely to our contention, as well as contrary to an overwhelming line of decisions of this court, both prior and subsequent thereto, and that the appeal to this court was dismissed under an agreement of compromise. The decision constitutes a precedent which the plaintiff in error might have cited as an authority upon the points involved. It ought not to have been stated, however, as a part of the facts of this case. The land which was involved in that case was never acquired by the State as we understand the matter, but, on the contrary, is supposed to have passed to private owners by virtue of valid and complete Spanish grants prior to the admission of the State into the Union. This probably accounts for the fact that those who claim the shore which is involved in this litigation, and that south thereof, as well as those who claim the shore in front of the city lying between the One and Three-Mile Creeks did not join in this litigation, but that the bill was filed by the claimants of only a restricted limit, as will appear by reference to the maps on file in the Leverich record. For what legitimate purpose the plaintiff in error could have inserted this precedent as a part of the facts of this particular case, we are unable to understand.

Much has been said in the brief for the plaintiff in error as to the improvements and upbuilding of the shore in front of the City of Mobile, based upon the faith of the ownership of the shore, by

the abutting proprietors. We do not know to what extent this court will go in taking judicial knowledge of the physical conditions at Mobile, but if those physical conditions are known to this court, it is perforce the truth that must be known, which is that the shore of the Mobile River has been largely built up and improved in that district which was covered by the decision in the Leverich case, but that shore which lies north and the shore which lies south of this district, and which includes the land in question, remains to-day almost wholly unwharfed and but little improved.

There is, and there has been, for a great number of years, in the Supreme Court of Alabama, an established rule as to the extent of grants upon navigable streams, whereby a grant which is bounded by a non-tidal stream is to be construed as intending to grant to the low water mark; while a grant upon a tidal stream is to be construed as intending to grant only to the high water mark. This distinction is of universal recognition, as we have undertaken to show in our original brief upon this subject. It is our present purpose, however, only to demonstrate the inaccuracy of the statement of the plaintiff in error to the effect that the decision of the Supreme Court of Alabama in the present case, limiting the title of the upland owner to high water mark, is a departure from the previous decisions of the Supreme Court of Alabama upon the same subject. In doing this, we shall have occasion to show that the plaintiff in error has, in discussing the authorities, entirely lost sight of the distinction above referred to, and cited the cases wholly without discrimination.

The first expression upon this subject that we have found in the opinion of the Supreme Court of Alabama, is contained in the case of Hagan vs. Campbell and Cleveland, 8 Port., page 24, where it is said: "It appears that the land was situated in the then district of Mobile and on the west side of the Mobile river. The rights of riparian owners are diverse, depending upon the fact whether the land is bounded on a river where the tide ebbs and flows, or whether it lies along a stream above tidal water. In the

former case, the right of the soil, according to the common law, extends but to high water mark. The shore below the common tide belongs to the public, and by a grant it may become the property of a citizen."

The same point was next decided in the case of City of Mobile vs. Eslava, 9 Port., 577. We find it re-decided in Goodtitle vs. Kibbe, 1 Ala., 403, Kennedy vs. Beebe, 8 Ala., 914 and Pollard vs. Greit, 8 Ala., 941.

The same doctrine has also been upheld in this court in applying the Alabama rule to the title to the shore of the Mobile river.

Pollard vs. Hagan, 3 How., 212.
Goodtitle vs. Kibbe, 9. How., 471.
Hallett vs. Beebe, 13 How., 25.

In the case of Mobile vs. Hallett, 16 Pet., 266, this court pointed out the fact that such was the established rule in Alabama. It was there said: "A primary rule of construction, according to the English common law as applicable to grants of land made by the government to individuals, when they front on the shores of tide-waters, is, that they go no further than ordinary high-water mark; and if the grant extends over the tide-water, taking the high land on both sides, the land under water does not pass by the ordinary terms of grant, applicable to high lands; because the soil under tide-waters is a public sovereign right, and an estate to itself, in the sovereign, held in trust for the public use, separate from the highland. This is the settled doctrine in England, as will be seen by the case of the Royal Fishery of the Baune, 8 James 1, reported by Sir John Dory, 149; and by Angel, in his Treaties on Tide waters, App. 35, Ed. of 1826.

"The case was recognized as sound law by the court of King's Bench, in Carter vs. Muscott, Burr. Rep. 2162, in which it is said, 'That navigable rivers, or arms of the sea, belong to the Crown, and not like private rivers, to the landowners on each side; and therefore the presumption lies the contrary way in the one case from which it does in the other. Here, indeed, it lies

prima facie, on the side of the king and the public.' 'The case of the Royal Salmon Fishery in the river Baune, in Sir John Dory's Reports, is agreeable to this; and it is a very good case.'

"The same doctrine has been maintained in Massachusetts, as will be seen by the case of Storer vs. Freeman, 6 Mass. Rep., 435. In that State, a local peculiarity exists which is explained by the court.

"So in New York. Palmer vs. Hicks, 6 Johns, 133; Mayor, &c., of New York vs. Scott, 1 Caines' Rep., 355. And in many subsequent cases this rule of construction is recognized.

"I understand the same rule to apply by force of the laws of Spain, to the Spanish grant under which the defendant Hallett claims. So the Supreme Court of Alabama held in Hogan vs. Campbell, 8 Porter's Ala. Rep. 1, 24. And see Mayor, &c., of Mobile vs. Eslava; opinion of Supreme Court of Alabama. And I feel disinclined on this point to look beyond the decisions of the State Court of Alabama; if power to look beyond it exists in this court, on this particular point; which I doubt."

It is not at all difficult, therefore, to understand why the Supreme Court of Alabama should, in their opinion in the case at bar have said that the authorities cited by the plaintiff in error "In no wise conflict with the common law rule so often approved by this court, and other jurisdiction that on streams where the tide ebbs and flows grants of adjoining land only extend to the ordinary high tide line along the shore."

Speaking of this subject, the plaintiff in error says in his brief, page 27: "Had this (the case at bar) been the first decision involving the riparian lands of Mobile river, conceding that Mobile river is a river, with tides such as the courts of England had in mind when framing the rule as to the line of water to which private ownership extends, the decision would be unassailable in this court."

"But in the face of the long list of decisions of the same court practically recognizing the rule of Webb vs. Demopolis, as ex-

tending the whole length of Mobile river, as well as the extent of Spanish, French and English grants to the channel of the river and also the right of private owners to lands reclaimed from the river far below high-water mark, this decision comes as an assault upon vested rights and as depriving the plaintiff in error of property without due process of law and without due compensation."

In view of the above quotation and in view of the assertion frequently reiterated in the brief for the plaintiff in error to the effect that the established rule in Alabama has always extended the upland owner's line to the lower water mark, it is interesting to observe that the plaintiff in error has not been able to cite a single authority in the Supreme Court of Alabama or the Supreme Court of any other state, or from any English court, holding that the upland owner upon a tidal stream takes below high water mark. This an examination of the authorities cited by the plaintiff in error upon this point will demonstrate. The three cases of McGee vs. Hallett, 22 Ala., 699, Hagan vs. Campbell, 8 Port., 9, and Hall and Walker vs. Hunt, 7 Ala., 882, all involved a construction of the same Spanish grant, and held simply that the language of the particular grant then under discussion explicitly extended the boundaries of the grant to the channel of the river. This is true not only of the grant which the court was then considering, but Spanish grants to several other tracts in Mobile, which explains the fact pointed out by the plaintiff in error that much of the eastern portion of the city of Mobile is built upon made land. The fact, however, that the grant considered in the three cases mentioned and several other grants, instead of bounding the land by tidal stream, explicitly stated that it should extend to the channel of the river, and the holding that these grants were valid, since they were made prior to the acquisition of the territory by the United States and prior to the admission of the state into the Union, throws no light whatever upon the inquiry as to whether the United States could convey the title below high water mark after the state obtained the title, nor upon the question as

to a proper construction of a grant in which the tidal stream is set down as a boundary line. In Goodtitle vs. Kibbe, 9 How., 471, and again in Shively vs. Bowlby, 152 U. S., 28, it was pointed out that the United States might have granted the shore or confirmed a Spanish grant to the shore before the state became a member of the Union, but that this was not in conflict with the holding that the United States' government could not do so after the state acquired the title.

The case of Doe (Kennedy) vs. Jones, 11 Ala., 63, like the three cases already mentioned, simply involved the construction of a grant to the soil below high water mark which had been made by the Spanish government long before the Treaty under which the United States obtained the title to the property in question, and this decision was simply to the effect that a transfer of the possession of Mobile to the United States did not interfere with the title already granted below high water mark. The case involved neither a construction of a grant bounded by a tidal stream, nor the power of the United States to grant the shore subsequent to the admission of the state into the Union.

The case of the City of Mobile vs. Eslava, 9 Port., 577, not only did not decide that such a grant would extend to low water mark, but decided explicitly on the contrary that the shore vested in the state.

The case of Webb vs. Demopolis, 95 Ala., 116, and the same case in the 87 Ala., 670, involved the title to the bank of a non-tidal stream. We have already in our previous brief pointed out that none of the following cases touches upon this subject.

Williams vs. Glover, 66 Ala., 189.
Howard vs. Ingersoll, 17 Ala., 790.
Bullock vs. Wilson, 2 Port., 445.
Former Brief pages 21, 22 and 23.

The case of Bayzer vs. McMillan, 105 Ala., 395, was an action for damages for obstructing a non-tidal creek, and throws no light upon the subject.

The case of Sullivan vs. Spottswood, 82 Ala., 163, did involve a boom upon a tidal stream, but the question of ownership of the soil was not involved. This case involved simply the question as to whether the lessee of a certain boom was thereby estopped from asserting that the stream was a navigable stream, and the case involved simply the construction of the lease and not the title of the lessor to the property. The lessee could not, of course, dispute the right of the lessor. Neither the state nor any person claiming under the state was contesting the right of the lessor.

It will be observed, therefore, that no authority has been cited upholding the contention of the plaintiff in error that the low water mark has been held in Alabama to constitute the boundary line upon a tidal stream.

TIDE DOES EBB AND FLOW IN MOBILE.

The plaintiff in error has devoted pages 28-33 of its brief to the contention that the Mobile river is not a tidal stream, and has taken great pains to demonstrate that while the tide ebbs and flows in the Mobile rivers, the ebb and flow does not cover any large tract of land. The complaint in this case involves only the land between the high-water and the low-water mark. If there is no such land, the plaintiff in error has brought this case to the Supreme Court of the United States in order to defeat a foolish claim to nothing. That the tide does ebb and flow at Mobile is a fact of which the Supreme Court of Alabama, as well as the Supreme Court of the United States, have taken judicial knowledge in a great many cases.

City of Mobile vs. Eslava, 9 Port., 577.
Kennedy vs. Beebe, 8 Ala., 909.
Pollard vs. Greit, 8 Ala., 943.
Pollard vs. Hagan. 3 How., 212.
Goodtitle vs. Kibbs, 9 How., 471.
Hallett and Walker vs. Beebe, 13 How., 25.
Sullivan vs. Spotswood, 82 Ala., 163.
Boulo vs. The N. O. R. R. Co., 55 Ala., 480.
Pollard vs. Files, 2 How., 607.
Mobile Trans. Co. vs. City of Mobile, being the case at bar.

These cases settle beyond peradventure that the owner of the upland under a patent bounding the lands upon Mobile river, has never been permitted by the State to take below high-water mark. The question as to how far an upland owner shall be permitted to take is a question of State policy, and wherever it is permitted to take below high water mark, it is a matter of gratuity from the State, so that it would be perfectly competent for the State to say that the upland owner may extend his holdings to the low-water mark upon one stream, but that the upland owner on another stream of identically the same character should not extend beyond high-water mark, and this regardless of the ebb and flow of the tide in either stream. One citizen might perhaps complain that there was no just distinction between himself and his neighbor, and that the policy of the State should be the same upon both streams, but the fact that the State had been more generous to the owners of land upon one stream than to the owners of land upon another stream would not confer any jurisdiction upon this court to correct the policy, so that the material question is not why the State of Alabama has permitted the owners upon other streams or at other points to extend their land to low-water mark, while permitting the upland proprietor at Mobile to extend only to high-water mark. The only question really is has such been the policy of the State? That the tide does ebb and flow at Mobile is, however, set down on every chart which we have seen and is known to every man who is informed upon the subject.

The plaintiff in error has cited the case of San Francisco vs. Leroy, 138 U. S., 656, in support of its contention that the title to the shore of Mobile river did not pass to the state when Alabama became a member of the Union, because as they insist Mobile river is not a tidal stream. The rule which began with Pollard vs. Hagan, 3 How., 212, and which has ever since been adhered to, established that the state retained the title to the bed and shore of all navigable streams whether they were tide water streams or not, and the case of San Francisco vs. Leroy, as we understand it,

simply distinguishes the shore below high water mark and certain flats which were properly classed as swamps and overflow lands. The rule that the question as to how far the title upon upland owner upon navigable streams shall extend, even where the tide does not ebb and flow, has been frequently announced in this court.

St. Anthony Falls Water Co. vs. St. Paul Water Commrs., 168 U. S., 349.
I. C. R. R. Co. vs. Illinois, 146 U. S., 517.
St. Louis vs. Ruiz, 138 U. S., 250.
Barney vs. Keokuk, 94 U. S., 324.

THE ACT OF JANUARY 31ST, 1867, CREATED A TRUST.

The plaintiff in error next points out the fact that the act of 1867 conferred the title upon the City of Mobile in trust for the public, and the further fact that the Legislature of Alabama have, by several of its acts, recognized the existence of a private ownership of wharves at Mobile.

The first suggestion has been fully answered by the opinion of the Supreme Court of Alabama in this case. Conceding that the act of January 3, 1867, conferred the title upon the city in trust, as stated in the Act itself, "To hold, possess, direct, control and manage the shore and soil in such manner as they might deem best for the public good," this constitutes no reason why the plaintiff in error should be permitted to withhold to its possession, so that the city of Mobile could not "hold, possess, etc.," as it might think best for the public good. To say that the city holds as trustee, is not to deny its right of possession.

The case of the Mayor of Mobile vs. Moog, in the 53rd, Ala., 568, has been cited to establish that the purpose of this act was to "Transfer the right and power of the state in and over the shore of the river and the soil under it in front of Mobile to that city, to be exercised by it as the state should exercise it for the general good in ***preventing the navigability of the river from being impaired and in restraining purpestures along the river front***

and below high water line by describing the manner in which and the extent to which wharves and other structures should be built into and over the water." From this construction of this act, the Supreme Court, in the present case, has not departed, but the trust would be wholly inoperative and the power of the city nothing, if the defendant and other persons who felt so disposed, could take the adverse possession of this shore from the city, and hold it in defiance of the right conferred upon the city in the terms of the act "To hold, possess, direct, control and manage the shore and soil therein granted." In our original brief we have cited a vast array of authority to the proposition that the state possessed the power to confer upon the city or upon any individual the absolute title to the shore, and that the act of 1896 was, therefore, a valid exercise of its discretion. The question, however, is not involved in the present appeal, since the right of possession in the city exists and is of equal force, whether the city holds in trust or in fee simple, and whether it can convey an interest therein to other persons or not.

The question as to whether the State can convey the title to the shore to third persons has never been before the Supreme Court of Alabama, so far as we know.

THERE ARE PRIVATE WHARVES IN MOBILE.

It is indisputably true that there exists in Mobile many wharves which are the private property of citizens. This arises from the fact that there were certain grants both French and Spanish which were entirely complete prior to the inception of the title of the United States Government. This is fully demonstrated by the cases already referred to of McGee vs. Hallett, 22 Ala., 699; Hagan vs. Campbell, 8 Port., 9; Hall and Walker vs. Hunt, 7 Ala., 882 and Doe vs. Jones, 11 Ala., 863.

Besides this, other portions of the shore may have been acquired from the State of Alabama since it acquired the title thereto.

It is not peculiar, therefore, that the Legislature of Alabama should have found it necessary or proper to pass numerous acts for the government of the wharf property in Mobile fully recognizing that private ownership existed. This, of course, does not tend to show that all of the shore in front of Mobile was held by private owners, nor that the plaintiff in error has any title to the particular land in controversy.

DUE PROCESS OF LAW.

The plaintiff in error devotes pages 35-39 of his brief to the contention that it has been deprived of this property without due process of law. Exactly what is meant by this we do not pretend to understand, unless it is supposed by the plaintiff in error that every erroneous decision constitutes a confiscation of property without due process of law. In other words, the argument of the plaintiff in error seemed to be about as follows: The land sued for was my property; the Supreme Court of Alabama has decided that it was not my property; therefore, the decision of the Supreme Court of Alabama took my property from me with compensation, and without due process of law.

STATUTE OF LIMITATIONS.

The argument in regard to the statute of limitations has been fully answered in the original brief. We desire, however, at this time to deny the plaintiff in error's statement contained on page 42 of his brief, that the court excluded the testimony of the plaintiff in error tending to show that Bernody had been in the adverse possession of this property for 75 years. The court declined, it is true, to permit testimony of adverse possession offered without indication as to what time it had reference to, but the plaintiff in error made no offer whatever of any evidence relating to any period prior to the conveyance by the State to the city.

RIPARIAN RIGHTS IN ALABAMA.

Under the heading of riparian rights in Alabama, the plaintiff in error has cited several cases which, when properly understood, are wholly inapplicable. The doctrine of accretions has nothing to do with this case, as this case involves only land between the channel of the river and the present high water mark. We have in our previous brief undertaken to show, however, that the right of accretions can be cut off by the State at any time prior to their formation, and that none of the cases awarding accretions to the upland owner involved controversies between the State and its grantee, on the one part, and the owner of the upland on the other, arising before the formation of the accretions. The case of Miller vs. Collum, 4 Ala., 582, was a controversy between individuals in which the upland has never been separated from the shore, and in which the right to the accretions formed necessarily belonged to the owner of the upland. The case of Hagan vs. Campbell, 8 Port., 33, which has been so persistently cited by the plaintiff in error, involved, as we have already had occasion to point out, a complete grant by the Spanish government in express terms to the channel line by which the title passed to the grantee prior to the acquisition of the territory by the United States, so that no question of the State's title was ever involved. The case of Hallett vs. Hunt, 7 Ala., 882, involved identically the same grant. The case of Compton vs. Hankins, 90 Ala., 414, involved the right of wharfage upon a navigable stream far above the ebb and flow of the tide, and is to be classed with Webb vs. Demopolis, referred to in the opinion of the Supreme Court in the present case and fully discussed in our original brief.

The case of Boulo vs. New Orleans Railroad Company, 55 Ala., 489, is not in point, and decides only that the wharf in that case has never been held adversely and belonged to neither party in the case.

LEGISLATION AS TO CITY OF MOBILE.

In discussing the 9th and 15th specifications of error, much has been said in the brief of counsel as to the effect of the Act of Alabama approved February 11, 1879, and entitled "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile and to provide for the application of the assets thereof in discharging the debts of such corporation. The effect of this act was argued and decided by the Supreme Court of Alabama, but it is not here presented by any specification of error. The 9th and 15th specifications of error refer to an entirely different act, namely, to the recent charter of the City of Mobile. The question presented upon the two acts, however, is the same, and has been fully discussed in our previous briefs upon the subject. It may be remarked, however that the effect of the identical act discussed by the plaintiff in error came before this court in the case of Mobile vs. Watson, 116, U. S., 301, and was there fully determined in accordance with our contention.

SPANISH GRANT.

In briefing this case originally, we had not supposed that it would be seriously contended that the plaintiff in error held under a complete and valid Spanish grant, and perhaps treated this subject with too little care. We beg, therefore, to supplement our former brief upon this point.

The Supreme Court of Alabama will never look beyond the record which is before it in order to ascertain what evidence was introduced in the lower court. By a reference to page 46 of the record, it will be seen that the bill of exceptions simply recited that the plaintiff in error offered in evidence certain portions of the American State Papers, but did not set forth the contents thereof. Under the practice in Alabama, the Supreme Court could not look beyond this bill of exceptions in order to ascertain what was contained in the document thus referred to. The plaintiff in error has

undertaken to overcome this difficulty by inducing the Chief Justice of the Supreme Court of Alabama to certify, record page 18, the contents of the American State Papers. The Chief Justice of the Supreme Court of Alabama, however, has no power to add to the record upon which the Supreme Court of Alabama acted, nor can this court, in reversing the Supreme Court of Alabama, base its judgment upon facts which were not before tee Supreme Court of Alabama, and which appeared only from ex parte certificate of the Chief Justice of the State.

When, however, we look at the contents of the American State Papers, as certified by the Chief Justice, we find that the report of the Commissioner therein set forth does not, in any manner, describe the lands to which it refers, and that the land referred to in the field notes made in 1835, record pages 22-23, are in no manner, identified with the land which is the subject matter of this litigation. If we could concede that the contents of these state papers and the field notes in question show a complete Spanish grant to Bernody, they would, nevertheless, be wholly irrelevant and immaterial to our inquiry. It will be observed that the land referred to in this respect, as well as that described in the field notes, is bounded by the Mobile river. A Spanish grant bounded by a navigable stream where the tide ebbs and flows confers title only to high water mark. A perfect Spanish grant confers title only down to high water mark. In the case of City of Mobile vs. Hallett, 16 Peters, 266, it is said: "A primary rule of construction, according to the English common law as applicable to grants of land made by the government to individuals, when they front on the shores of tide-waters, is, that they go no further than ordinary high-water mark: * * * * * * *

"I understand the same rule to apply by force of the laws of Spain, to the Spanish grant under which the defendant Hallett claims. So the Supreme Court of Alabama held in Hogan vs. Campbell, 8 Porter's Ala. Rep. 1, 24. And see Mayor, &c., of Mobile, vs. Eslava; opinion of Supreme Court of Alabama. And

I feel disinclined on this point to look beyond the decisions of the State Court of Alabama; if power to look beyond it exists in this court, on this particular point; which I doubt."

But this suit does not involve any land above high water mark, and, therefore, would have no reference whatever to the land covered by the Spanish grant, if there had been one.

We observe that the plaintiff in error had cited the cases of Hagan vs. Campbell, 8 Port., 9, and Hallett vs. Hunt, 7 Ala., 882, as holding that a Spanish grant bounding the land by a navigable stream, extends to low water mark or the channel of the river. An examination of these cases, however, will demonstrate that they did not, in any manner, involve the question as to how far a Spanish grant extends when it simply names the navigable streams as a boundary line, but involves the simple question as to whether under the particular grant which the court was then considering, the language was not so explicit as to show that it was the intention of the Spanish government to depart from its general rule, and to convey the land below high water mark.

If we ignore all this, and look into the state papers, this evidence establishes that the commissioner made the report therein contained, but does not establish the truth of any fact stated in the report.

Watkins vs. Holman, 16 Pet., 25.
Chastang vs. Dill, 19 Ala., 421.

Nor did the commissioner report that any Spanish grant ever existed, but, on the contrary, simply reported, record page 19, that Bernody claimed 600 arpens of land on the Mobile river, and that this claim was founded "as the claimant supposed on grants lost by time or accident. The recommendation was not for a confirmation of the grant, but for the confirmation of a reasonable quantity of land." Nor was this land confirmed by the act of March 3, 1819, as it would have been, had the grant been reported as complete, but, on the contrary, the matter was again referred

to another commissioner, and was again reported on November 16, 1820.

3rd Vol. Amer. State Papers, pp. 392-400.

It is stated by the plaintiff in error, that so long as Spain had the actual occupancy of the territory in which Mobile is located, it had the power to grant away the lands, and such grants would be valid as against the title of the United States' government, and superior to the title of the states to the shore and bed of navigable streams.

The case of Cousins vs. Blanc's Executors, 19 How., 202, appears to us to be conclusive upon the point that the Spanish grant of an undefined territory, to the identification of which a survey was necessary, could not be a complete Spanish grant, and cannot operate to pass title until it was confirmed, and could not therefore, operate to defeat the title granted by the United States government in the meantime.

It is, too, we think thoroughly settled, that an incomplete Spanish grant passed no title until confirmed, and then only such title as the United States government had at the date of the confirmation, and that where, as in this case, the confirmation is subsequent to the admission of the state into the Union, no title whatever passes thereby.

City of Mobile vs. Eslava, 9 Port., 577.
Goodtitle vs. Kibbe, 1 Ala., 403.
Kennedy vs. Beebe, 8 Ala., 909.
Pollard vs. Greit, 8 Ala., 941.
Pollard vs. Hagan, 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 478.
Hallet vs. Beebe, 13 How., 25.
Pollard vs. Files, 3 Ala., 49.

In Shively vs. Bowlby, 152 U. S. page 28, it is said: "So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory at and before the admission of the state into the Union, was not necessary to the decision, which in-

volved on a grant made by Congress after the admission of Alabama, and which was followed into two similar cases in which Congress, after the admission of the state, had undertaken to confirm Spanish grants, made after the treaty of San Idlefonso of 1800, and therefore passing no title whatever. Goodtitle vs. Kibbe, (1850) 9 How., 471; Hallett vs. Beebe (1851), 13 How., 25. In the first of these cases, Chief Justice Taney, speaking for the whole court, of which Mr. Justice McKinley, was still a member, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a state, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the state.'" 9 How., 478.

We submit therefore:

1. That there is no evidence whatever of any Spanish grant, complete or incomplete, to the land in question.

2. That a Spanish grant, had it existed, would have extended only to high water mark.

3. That it being undefined, a Spanish grant could not pass title until a survey was had, and that the survey having been subsequent to the date when the title passed to the State could not operate to deprive the State of its title.

4. That the confirmation of the grant by the United States government having been necessary to its vitality, and not having taken place until after the State had acquired its title, it could not pass the title of the United States government to that with which it had already parted.

Respectfully submitted.

HARRY T. SMITH,
GREGORY L. SMITH,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 599.

MOBILE TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF MOBILE, DEFENDANT IN ERROR.

MOTIONS TO DISMISS OR AFFIRM.

Comes the defendant in error herein and moves this honorable court to dismiss this writ of error, as this court has no jurisdiction thereof, or to affirm the judgment, it being manifest that, even if this court has jurisdiction, the writ of error was taken for delay only, or that the question on which the judgment depends is so frivolous as not to need further argument.

HARRY T. SMITH,
Attorney for the Defendant in Error.

[Endorsed:] File No., 18,084. Supreme Court U. S., October term, 1900. Term No., 599. The Mobile Transportation Company, P. E., *vs.* The City of Mobile. Motion to dismiss or affirm. Filed April 10, 1901.

Supreme Court of the United States.

No. 62—October Term, 1902.

The Mobile Transportation Company, Plaintiff in Error, *vs.* The City of Mobile } In error to the Supreme Court of the State of Alabama.

[January 5, 1903.]

This was an action in ejectment brought in the State Circuit Court by the city of Mobile against the Mobile Transportation Company, to recover a portion of the shore and bed of the Mobile River in the city of Mobile, between high-water mark and the channel line or point of practical navigability.

In support of its title the city relied upon the following acts:

1. An act of Congress approved March 2, 1819, entitled "An act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States." (3 Stat. 489.)

2. An ordinance of the convention of Alabama adopted August 2, 1819, accepting the proposition offered by Congress. (Code of Alabama, 1876, p. 68.)

3. A resolution of Congress of December 14, 1819, declaring the admission of the State into the Union, with a constitution which had been adopted by the State. (3 Stat. 608.)

4. An act of the general assembly of Alabama, approved January 31, 1867, entitled "An act granting the city of Mobile the riparian rights in the river front." (Acts of 1866–7 p. 307.)

5. An act of the assembly, approved February 18, 1895, entitled "An act to fix the right of the city of Mobile to certain real estate." (Acts of 1894–5, p. 815.)

6. An act approved December 5, 1896, (Acts of 1896, p. 49,) amending the last act.

Several acts respecting the incorporation of the city of Mobile, unnecessary to be considered, were also offered in evidence. It was admitted that defendant was in possession of the lands.

Defendant pleaded the statute of limitations, and offered in evidence certain "Documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress," and par-

ticularly that relating to the claim of one Regis Bernoudy, who claimed under a Spanish grant made March 3, 1792, to Joseph Munora, together with evidence of the report of the land commissioner in favor of his claim, and a patent of the United States dated December 28, 1836, to the assignees of Bernoudy, wherein it was recited that the claim of Bernoudy (entered as No. 11) was affirmed, had been surveyed, and was by such title granted unto his assignees. The defendant also offered an unbroken chain of deeds from these assignees to the Transportation Company, as well as proof of an adverse possession of the lands described in the complaint, under a color of right, for twenty years before bringing suit.

All this evidence was excluded by the Circuit Court, whose action in that particular was affirmed by the Supreme Court of the State. (128 Ala. 335.)

Mr. Justice Brown delivered the opinion of the Court.

1. Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain, (8 Stat. 252,) and a patent of the United States dated December 28, 1836, in alleged confirmation of such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of opinion that they cannot be so considered, and the motion to dismiss must therefore be denied.

There are fifty-eight assignments of errror, none of which require separate consideration, since all turn upon the respective titles of the parties to the land in question. As the plaintiff in an action of ejectment is bound to recover upon the strength of his own title, we shall first consider the several objections made to the title of the city.

2. That the State of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters, below high-water mark within the limits of the State, not previously granted, was so conclusively settled by this court in *Pollard's Lessee* v. *Hagan*, (3 How. 212,) as to need no further consideration. This was also an action of ejectment for lands below high-water mark in the city of Mobile. The plaintiffs insisted that, by the compact between the United States and Alabama, on her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the State, that the same should remain at the sole disposal of the United States; and that all the navigable waters within the State should forever remain public highways; and hence, that the lands under the navigable waters, and the public domain above high water,

were alike reserved to the United States, and alike subject to be sold by them; and that, to give any other construction to these compacts, would be to yield up to Alabama, and the other new States, all the public land within their limits. This court, however, held that, when Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the time she ceded the Territory of Alabama to the United States, and that nothing remained to the latter, according to the terms of the agreement, but the public lands. In summing up its conclusions the court held: "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The Supreme Court of Alabama having approved a charge to the jury that "if they believed the premises sued for were below the usual high-water mark, at the time Alabama was admitted into the Union, then the act of Congress" (passed in July, 1836, confirming the title of the plaintiff) "and the patent in pursuance thereof, could give the plaintiffs no title," its judgment was affirmed. The opinion of the court was pronounced in 1844.

Prior to this time, however, and in 1839, the Supreme Court of Alabama in the case of *Mayor &c. of Mobile* v. *Eslava*, (9 Porter, 577,) had also held that the navigable waters within that State, having been dedicated to the use of the citizens of the United States, it was not competent for Congress to grant a right of property in the same, and that the navigable waters extended not only to low water, but embraced all the soil within the limits of high-water mark. This case was also affirmed by this court, (16 Pet. 234,) though the case as here presented did not turn upon the rights of the State to land beneath its navigable waters below high-water mark.

This was also declared to be the doctrine of the Supreme Court of Alabama as late as 1853, when in *Magee* v. *Hallett*, (22 Ala. 699,) it was held that, if the Mobile River were the eastern boundary of the grants in question, the lines could not under the decisions of that court, as well as those of the Supreme Court of the United States, extend beyond high-water mark at that time, citing *Pollard's Lessee* v. *Hagan*, (3 Ala. 291,) affirmed as above stated in 3 How 212; *Abbott* v. *Kennedy*, (5 Ala. 393,) and *Goodtitle* v. *Kibbe*, (9 How. 471.) This last case was little more than an affirmance of *Pollard* v. *Hagan*.

On January 31, 1867, the general assembly of Alabama passed "An act granting the city of Mobile the riparian rights in the river front," the first

section of which enacted that "the shore and the soil under Mobile River, situated within the boundary lines of the city of Mobile, as defined and set forth in section 2 of an act to incorporate the city of Mobile, approved February 2, 1866, be and the same is hereby granted and delivered to the city of Mobile."

"SEC. 2. *Be it further enacted*, That the mayor, aldermen and common council of the city of Mobile be and they are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good."

In *Boulo* v. *New Orleans &c. R. R. Co.*, (55 Ala. 480,) decided in 1875, it was also held that the title to the shore of all tide-water streams resides in the State, for the benefit of the public, and its use by the public for the purpose of commerce was not only permissible, but in accordance with the trust annexed to the title. The place in controversy was a slip beneath two wharves, but whether it was covered at high tide by the water of the river was a fact about which the evidence conflicted, though the court inclined to the opinion that land had been formed which was not usually covered by water at high tide. It was held the title was in the State.

In *Williams* v. *Glover*, (66 Ala. 189,) part of the land in controversy was an island in the Tennessee River. Some twelve acres of the tract lay between high and low-water marks, and was covered with water in high floods. The court held that the ownership of the plaintiff extended to the margin of the water at its ordinary stage, and hence embraced the land between high and low-water marks. As the Tennessee River is not a tidal stream, but empties into the Mississippi far to the north of Alabama, the court in using the words "between high and low-water marks" must have had reference to the difference between the river at floods and at its ordinary stage. No reference was made to the prior authorities respecting tide waters.

In *City of Demopolis* v. *Webb*, (87 Ala. 659,) the case did not turn upon the ownership of land below high-water mark, although the court, in delivering the opinion, said: "Under our decisions, when a person owns lands on a navigable river his ownership is held to extend so far as to embrace the land between high and low-water marks," citing *Williams* v. *Glover*, (66 Ala. 189,) which, as before stated, related to land upon an island in the Tennessee River and not upon a tidal stream. The land in question was in the city of Demopolis, on the Tombigbee River, a navigable stream emptying into the Bay of Mobile, and at this point apparently far above the tidal effect. In the same case afterwards before the court on its merits, (*Webb* v. *Demopolis*, 95 Ala. 116,) the court held that whether a grant of the United States to land lying on a navigable stream

within the limits of a State extends to high or to low-water mark or to the middle thread of the stream, was not a Federal but a local question, citing *Barney* v. *Keokuk*, (94 U. S. 324;) *Packer* v. *Bird*, (137 U. S. 661;) *St. Louis* v. *Rutz*, (138 U. S. 226;) *Hardin* v. *Jordan*, (140 U. S. 631,) and *Kaukauna Co.* v. *Green Bay &c. Canal Co.*, (142 U. S. 255,) and also held that "the rule which this State has adopted and declared through this court is that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low water." In none of the above cases cited from our reports were the lands situated within tide waters.

Relying upon these cases from the Supreme Court of Alabama, the Transportation Company attack the constitutionality of the act of January 31, 1867, conveying to the city of Mobile the shore and soil under Mobile River, "because the act impairs vested rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of lands bordering on a navigable river includes the shore or bank of such river and extends to the water line at low water." In this connection the company insists that the decisions above cited constitute a rule of property in the nature of a contract with the owners of land adjacent to the Mobile River, which have been impaired by the construction given to the act of January 31, 1867; but, as we have already noticed, none of the cases related to tidal streams.

In its opinion in this case the Supreme Court of Alabama seems to admit that in *Webb* v. *Demopolis*, and one or two other cases relating to the shore line of streams *above the ebb and flow of tide waters*, the defendant was correct in supposing that the title of the riparian proprietor extended to low-water mark, but, said the court, "these cases in nowise conflict with the common law rule, so often approved by this court and other jurisdictions, that on streams where the tide ebbs and flows, grants of adjoining lands only extend to the ordinary high tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in *Webb* v. *Demopolis* to disturb this rule of property, supported by a vast array of authorities, without making reference to them."

But we are of opinion that there is no conflict between the cases in Alabama, inasmuch as the cases which hold that the rights of the riparian proprietor extend only to high-water mark are cases arising upon navigable *tide* waters, where the rise and fall are of daily occurrence, and not usually subject to much variation in height. In regard to this class of cases the rule laid down by the Supreme Court of Alabama in *Mayor &c. of Mobile* v. *Eslava*, (9 Port. 577,) that private ownership extends only to high-water mark, has been consistently adhered to ever since, and notably so in *Kennedy* v. *Beebe*, (8 Ala. 909, 914;) *Pollard's Heirs* v.

Greit, (8 Ala. 930, 941;) *Magee* v. *Hallett*, (22 Ala. 699, 719;) *Abbott* v. *Kennedy*, (5 Ala. 393;) *Boulo* v. *New Orleans &c. R. R. Co.*, (55 Ala. 480;) while, upon the other hand, the cases which hold that private ownership extends to low-water mark, *Bullock* v. *Wilson*, (2 Porter, 436;) *Williams* v. *Glover*, (66 Ala. 189;) *Demopolis* v. *Webb*, (87 Ala. 659,) and *Webb* v. *Demopolis*, (97 Ala. 116,) the lands were situated upon a navigable river far above the tidal influence, and high and low-water marks were determined, not by the action of the tides, but by the actual rise and fall of the river at different seasons of the year. With regard to this latter class of cases there is a great conflict of authority in the State courts, some holding that the rights of the riparian proprietor are bounded by high-water mark, others by low-water mark, and still others by the thread of the stream. Some of these cases are mentioned in the opinion of Mr. Justice Bradley in *Hardin* v. *Jordan*, (140 U. S. 371, 382,) and a large number of them are reviewed in part I, chap. 3, of Gould on Waters, where nearly all the cases seem to be collected.

But even if it were conceded that there had been a change of opinion in Alabama with respect to riparian rights upon tide waters, such change by no means raises a case under the contract clause of the Constitution The status of real estate within a particular jurisdiction is not so much one of contract as of of policy, which may be changed at any time by the legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession, good against the State, they could only be dispossessed by proceedings in eminent domain. The act of 1867 declared no more than that the rights possessed by the State in the shore and soil under Mobile River were granted to the city. We see nothing objectionable in this act. What the State held it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act. If subsequent cases have given any construction at all to that act, of which there seems to be some doubt, such construction would not present a Federal question, and if the Supreme Court of Alabama had changed its views with respect to the limit of private ownership upon tide waters, its decision in that regard cannot be reviewed by this court. (*Central Land Co.* v. *Laidley*, 159 U. S. 103; *Hanford* v. *Davies*, 163 U. S. 273.) Upon the whole, we are of opinion that there is no defect upon the face of the title of the city of which the Transportation Company was entitled to avail itself of.

3. We are next to consider whether the defendant has a vested right in these lands which could not be taken from it without compensation or proceedings in eminent domain.

By the eighth article of the treaty between the United States and Spain of February 22, 1819, (8 Stat. 252,) "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." In support of this alleged grant from the King of Spain, defendant offered in evidence volume 3 of the American State Papers, entitled "Documents, legislative and executive, of the Congress of the United States in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress, March 4, 1789, to June 15, 1834." That part of it relating to the claim of Regis Bernoudy of the land in question is printed in the margin.* The difficulty with this report is that

* Register of claims to land in the district east of Pearl River, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident.

* * * * * *

(Page 30.)

Number —, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph Munora.
Where situated, Mobile River.
Quantity claimed, area in arpens, 600.
Cultivation and inhabitation, from 1809 to 1813.

* * * * * *

(Page 31.)

(Signed) WILLIAM CRAWFORD,
Commissioner.

REMARKS.—Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims to such lands, not exceeding a reasonable quantity, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

(Signed) WILLIAM CRAWFORD,
Commissioner.

* * * * * *

(Page 400.)

No. 9.

Report on the conflicting claims of Joseph McCandless and Regis Bernody, both af whom claim the same tract of land, and in relation to whose claims the former commissioner reported favorably.

Former Commis's Report.

No. of report, 10.
No. of claim, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph S. Murona.

it contains no grant, but merely a supposition of the claimant that a grant once existed, and had been lost by time or accident. It is needless to say that this is no evidence of an actual grant; but a further and even more serious objection to the document is, that it contains no other description of the land granted than that it was 600 arpents in area, and was situated on the Mobile River, but that no survey of the land existed.

Apparently in confirmation of this claim defendant also offered in evidence a patent of the United States, dated December 28, 1836, wherein it was recited that this claim had been confirmed by acts of Congress passed in 1819 and 1822, and that it had been surveyed. Referring to these acts of Congress we find that both contain a proviso that the confirmations and grants provided to be made by the acts "shall amount only to a relinquishment forever, on the part of the United States, of all right and title whatever to the lots of land so confirmed and granted." Had this patent been issued before the admission of Alabama into the Union,

Nature of claim and from what authority derived, spa. pert. or cert. from commandant; grant lost by time or accident.

Date of claim, 3 March, 1792.

Quantity claimed, area in arpens, 600.

Where situated, Mobile River.

By whom issued, Carondelet.

Surveyed, no survey.

Cultivation and inhabitation, from 1809 to 1813.

* * * * * *

Report 10, claim 11.—The claim of Regis Bernody is founded on a conveyance made to him by Joseph Gaspar Munora, at Pensacola, which passed through the office of the commandant, as all authentic conveyances must have done in the Spanish posts of the intendancy, and recognizes the original grant or concession of the same made by the Baron de Carondelet in favor of said Munora on the 3d March, 1792, which grant was produced by Munora on the day of the execution of the conveyance to Bernody. The proof of the inhabitation and cultivation by Bernody (until forcibly expelled by McCandless) is complete, and the inference is strong that Munora, the grantee, did comply with the essential conditions of the grant, inasmuch as the instructions of Morales expressly charge the "notaries and commandants not to pass any conveyance of lands where the conditions of the grant were not previously proven to have been complied with; and, independently of this consideration, the declaration of Munora, in the conveyance to Bernody, that it was 'the same land that Antonio Espejo worked with his permission,' made, too, at a time when it could not be imagined that any rival claim would arise, furnishes a violent presumption that the land was inhabited or cultivated by or for Munora agreeably to the Spanish regulations. A full report of all the evidence presented by the conflicting claimants is herewith presented. Upon the best view we have been able to take of the relative merits of these claims, we are decidedly of opinion that the claim of Joseph McCandless ought to be rejected, and that of Regis Bernody confirmed."

W. BARTON, *Register.*

it would be difficult to see why it did not convey a perfect title; but it was fully settled by this court with respect to these titles in *Pollard's Lessee* v. *Hagan*, (3 How. 212;) *Goodtitle* v. *Kibbe*, (9 How. 471,) and *Doe* v. *Beebe*, (13 How. 25,) that, inasmuch as all lands below high-water mark had passed to the State of Alabama upon her admission into the Union in 1819, there was nothing left upon which a subsequent patent of the United States could operate.

There are other defenses presented by the record in this case, such as that of estoppel, by reason of improvements made upon this land with the acquiescence of the city, license to build a wharf, and payment of taxes; the unconstitutionality of the act of 1867, because the title of the act does not describe its subject; want of power in the State to convey its title to the city, and the statute of limitations. These, however, are all of a local nature and present no Federal question.

In connection with the power of the State to convey its interest in these lands to the city, as it attempted to do by the act of 1867, much reliance is placed by the Transportation Company upon the case of the *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. This case, however, is inapplicable for two reasons, first, it turns upon the power of the State to convey its right to the soil beneath the *navigable* waters of the State, and of course below low-water mark, not to a municipal corporation "created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good," but to a private railroad corporation to hold and control for its own purposes, second, that case came to this court from the Circuit Court of the United States, which was called upon to declare as an original question what power the State of Illinois had to convey the property in question to the Illinois Central Railroad Company; while this case comes up by writ of error to the Supreme Court of a State, which has itself put a construction upon an act of its own legislature and upon its conformity to the constitution of the State. The decision of that court upon these questions is obligatory upon us.

The judgment of the Supreme Court of Alabama is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.